In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1723

STATES STEAMSHIP COMPANY and
PACIFIC FAR EAST LINE, INC.,
Petitioners,

vs.

THE HONORABLE ALFONSO J. ZIRPOLI, SENIOR DISTRICT JUDGE,
(R. J. REYNOLDS TOBACCO COMPANY and
SEA-LAND SERVICE, INC.,
Real Parties in Interest),
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Ninth Circuit

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Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered on April 20, 1979, refusing a writ of mandamus directing the Honorable Alfonso J. Zirpoli, Senior Judge, United States District Court, Northern District of California, to vacate his order of January 9, 1979 requiring petitioners to proceed to trial without a jury as to contested issues of material fact raised by the pleadings

for which petitioners have properly demanded trial by jury pursuant to the Seventh Amendment to the Constitution of the United States and Rules 38(a) and 42(b) of the Federal Rules of Civil Procedure.

ORDERS BELOW

The January 9, 1979 order of the District Court requiring non-jury trial is set forth in Appendix A to this petition.

The order of the United States Court of Appeals for the Ninth Circuit denying the petition for a writ of mandamus is set forth in Appendix B to this petition.

JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit was entered on April 20, 1979.

The order of the United States District Court requiring petitioners to submit to non-jury trial was entered on January 9, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Seventh Amendment to the Constitution of the United States of America and Rules 38(a) and 42(b) of the Federal Rules of Civil Procedure.

The Seventh Amendment provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Rule 38(a) of the Federal Rules of Civil Procedure provides:

> "Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

Rule 42(b) of the Federal Rules of Civil Procedure provides:

> "Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States."

QUESTION PRESENTED FOR REVIEW

Is an order of a United States District Court, made pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, which requires that a party submit to a separate, non-jury trial of contested issues of material fact raised by the pleadings constitutionally permissible when the party has properly demanded trial by jury as to said issues; where the District Court has stated that it will itself decide facts and the credibility of witnesses as though there was an "actual trial" of said issues and where the court has indicated that its decision as to said issues of fact will be binding on the parties and be sustained by a Court of Appeals absent "really clear error" by the District Court in its fact finding process?

STATEMENT OF THE CASE

The Nature of the Case

These are consolidated private antitrust suits brought by petitioners under Sections 4, 12 and 16 of the Clayton Act [15 U.S.C. §§ 15, 22 and 26] to secure damages for and injunctive relief against violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and Sections 2(c), 3 and 7 of the Clayton Act [15 U.S.C. §§ 13(c), 14 and 18].

Material Facts

A. The Parties

Petitioner States Steamship Company [States] is a Nevada corporation with its principal place of business in San Francisco, California. During the period of time covered by its complaint, it was an ocean freight carrier engaged in the business of transporting freight by American Flag vessels in United States and foreign commerce. States entered proceedings under the United States bankruptcy laws in December, 1978.

Petitioner Pacific Far East Line, Inc. [PFEL] is a Delaware corporation with its principal place of business in San Francisco, California. During the period of time covered by its complaint, it was, like States, engaged in the business of transporting freight by American Flag vessels in United States and foreign commerce. PFEL entered proceedings under the United States bankruptcy laws in January, 1978, and is in the process of final liquidation.

Respondent Sea-Land Service, Inc. [Sea-Land] is a Delaware corporation. Sea-Land has its principal place of business in Menlo Park, New Jersey. Sea-Land is the largest steamship company in the United States and the largest

containerized steamship company in the world. Sea-Land operates 55% of all American flag container ships sailing between the United States and foreign countries and 31.6% of all container ships in the world. Sea-Land is wholly owned by R. J. Reynolds Industries, Inc., which, in addition to Sea-Land, owns and controls all the capital stock of a number of subsidiaries. These include: respondent R. J. Reynolds Tobacco Company, the largest manufacturer and marketer of tobacco products in the United States; McLean Industries, Inc., the largest trucking company in the United States and a holding company for Sea-Land; Reynolds Leasing Corporation, established by Reynolds Industries to act as a purchaser and charterer of ships, containers and chassis for the exclusive use of Sea-Land; RJR Foods, Inc., a major manufacturer and marketer of various food products; RJR Archer, Inc., a major manufacturer of packaging and wrapping materials, aluminum foil and specialty products; Aminoil International, Inc., a holding company for American Independent Oil Company; and, Aminoil USA, Inc., a major oil producer and marketer.

B. The Pleadings and Jury Demands

1. Pacific Far East Line, Inc.

(a) On October 15, 1976, PFEL filed its "Complaint For Damages And Injunctive Relief Under Federal Antitrust Laws (Jury Demanded)". The complaint alleged, *inter alia*, that Sea-Land had paid rebates in violation of the law. The complaint contains the following recitals and demand:

> "Plaintiff Pacific Far East Line, Inc. (hereinafter "PFEL"), demanding trial by jury, complains and alleges as follows: . . .

Pursuant to Rule 38(b), Fed.R.Civ.P., plaintiff hereby makes demand for jury trial." [Appendix C, pp. 1, 11].

(b) On November 9, 1976, Sea-Land filed its "Answer And Counterclaim Of Defendant Sea-Land Service, Inc.", praying for dismissal of the complaint, treble damages and injunctive and declaratory relief. Sea-Land alleged, both by way of affirmative defense and in its counterclaim, that PFEL was guilty of unclean hands and that it had violated the law by paying rebates and by issuing false denials of its own rebating practices. Sea-Land made no request for jury trial. [Appendix D].

(c) On December 17, 1976, PFEL filed its "Amended Complaint For Damages And Injunctive Relief Under Federal Antitrust Laws (Jury Demanded)". The amended complaint was more specific than the original complaint and alleged, *inter alia,* that Sea-Land had paid approximately $20,000,000.00 in rebates from 1971 through 1975. The amended complaint contains the following recitals and demand:

"Plaintiff Pacific Far East Line, Inc. (hereinafter "PFEL"), demanding trial by jury, complains and alleges as follows: . . .

Pursuant to Rule 38(b), Fed.R.Civ.P., plaintiff hereby makes demand for jury trial." [Appendix E, pp. 1, 15].

(d) On December 23, 1976, PFEL, pursuant to formal stipulation, timely filed its "Reply To Counterclaim of Defendant Sea-Land Service, Inc. and Counterclaim of Pacific Far East Line, Inc. (Jury Demanded)". PFEL's answer denied, *inter alia,* that it had paid rebates or had issued

false denials of the existence of rebates. PFEL's reply to Sea-Land's counterclaim contains the following demand:

"Pursuant to Rule 38(b), F.R.Civ.P., PFEL hereby makes demand for jury trial on all issues raised by the counterclaim of Sea-Land, PFEL's reply thereto and the counterclaim of PFEL." [Appendix F., p. 6].

(e) On January 7, 1977, Sea-Land filed its "Answer To Amended Complaint And Counterclaim Of Defendant Sea-Land Service, Inc.", praying for dismissal of the amended complaint, treble damages and injunctive relief. Sea-Land again alleged, both by way of affirmative defense in its counterclaim, that PFEL was guilty of unclean hands and that it had violated the law by paying rebates and by issuing false denials of its own rebating practices. Sea-Land made no request for jury trial. [Appendix G].

(f) On February 3, 1977, PFEL filed its "Reply To Counterclaim Of Defendant Sea-Land Service, Inc. And Counterclaim Of Pacific Far East Line, Inc. (Jury Demanded)". In its answer to Sea-Land's counterclaim PFEL denied that it had paid rebates or issued false denials of the existence of rebates. PFEL's reply to Sea-Land's counterclaim contains the following demand:

"Pursuant to Rule 38(b), Federal Rules of Civil Procedure, PFEL hereby makes demand for jury trial on all issues raised by the counterclaim of Sea-Land, PFEL's reply thereto and the counterclaim of PFEL." [Appendix H, p. 6].

2. States Steamship Company

(a) On March 21, 1977, States filed its "Complaint For Damages And Injunctive Relief Under Federal Antitrust Laws (Jury Demanded)". The complaint alleged, *inter alia,*

that Sea-Land had paid rebates in violation of the law. The complaint contains the following recitals and demand:

> "Plaintiff States Steamship Company (hereinafter "States"), demanding trial by jury, complains and alleges as follows: . . . Pursuant to Rule 38(b), Fed.R. Civ.P., plaintiff hereby makes demand for jury trial." [Appendix I, pp. 1, 11].

(b) On June 22, 1977, Sea-Land filed its "Answer To Complaint And Counterclaim Of Defendant Sea-Land Service, Inc.", praying for dismissal of the complaint, treble damages and injunctive and declaratory relief. Sea-Land alleged, both by way of affirmative defense and in its counterclaim, that States was guilty of unclean hands and that it had violated the law by paying rebates and by issuing false denials of its own rebating practices. Sea-Land made no request for jury trial, [Appendix J].

(c) On July 12, 1977, States filed its "Reply To Counterclaim Of Defendant Sea-Land Service, Inc. And Counterclaim Of States Steamship Company (Jury Demanded)". States' answer denied, *inter alia,* that it had paid rebates or had issued false denials of the existence of rebates. The reply of States to the Sea-Land counterclaim contains the following demand:

> "Pursuant to Rule 38(b), Federal Rules of Civil Procedure, States hereby makes demand for jury trial on all issues raised by the counterclaim of Sea-Land, States' reply thereto and the counterclaim of States." [Appendix K, p. 6].

C. Proceedings Incident to the Motion and Rule 42(b) Order for Non-Jury Trial

On July 24, 1978, Respondents Sea-Land and R. J. Reynolds Tobacco Company filed their motion:

> ". . . for an order pursuant to Rules 16, 37(b), 41(b), and 56 of the Federal Rules of Civil Procedure and the inherent powers of the Court (1) dismissing the Amended Complaint of plaintiff Pacific Far East Line, Inc. ("PFEL"), dated December 17, 1976, or in the alternative, striking paragraphs 31(a), 31(b), 31(p), 31(r), and 31(s) of the Amended Complaint of PFEL, (2) dismissing the Complaint of States Steamship Company ("States"), dated March 21, 1977, or, in the alternative, striking paragraphs 16(a), 16(b), 16(c), 16(d), 16(p), and 16(s) of the Complaint of States, (3) dismissing the Counterclaim of PFEL, dated February 3, 1977, (4) dismissing the Reply to Counterclaim and Counterclaim of States, dated June 12, 1977, (5) directing that plaintiffs shall make no use of the issue of rebating by Sea-Land for any purpose, including rebuttal or impeachment, at the trial of these actions, (6) directing that it shall be taken as established at the trial of these actions that PFEL and States paid rebates to consignees and shippers which had been employing Sea-Land in the trade between the United States and the Far East during the statutory period applicable to each action, and that Sea-Land lost revenues in the cotton trade because of such rebating by PFEL, and (7) directing plaintiffs, jointly and severally, to pay to defendants, as a condition to any further prosecution of these actions by plaintiffs, the full cost of defendants, including reasonable attor-

neys' fees, of defendants' discovery on the issue of rebating by the plaintiffs."[1]

The sole ground for respondents' motion to dismiss is an allegation made by them that petitioners were both guilty of unclean hands and had both, as a matter of uncontrovertible fact, engaged in rebating as charged in the Sea-Land answers and counterclaims and that, therefore, the District Court is authorized to dispense with jury trial and to treat petitioners' denials of rebating, consistently made by them in their answers to the Sea-Land counterclaims, in deposition testimony and in answers to interrogatories as false and, pursuant to an "obstruction of justice theory", impose the ultimate sanction of dismissal.[2]

Subsequent to the filing by respondents of their July 24, 1978 motion, petitioners filed their papers and affidavits in opposition to the motion and put before the District Court those record facts which, as admitted by respondents, flatly contradict the suggestion of respondents that rebating by petitioners as charged in the Sea-Land answers and counterclaims had been factually established.[3]

On November 13, 1978, the District Court announced that, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, the Court would itself conduct a non-jury trial of

[1]Motion for "Dismissal of Plaintiffs' Complaint and for Further Sanctions," filed July 24, 1978, p. 2.

[2]Motion for "Dismissal of Plaintiffs' Complaint and for Further Sanctions," filed July 24, 1978, pp. 2, 3.

[3]See for example, *inter alia*, plaintiffs' Affidavits and Certificates, filed August 21 and August 22, 1978; plaintiffs' Memorandum and Affidavits filed August 31, 1978; plaintiffs' Memorandum filed September 13, 1978; plaintiffs' memorandum filed September 15, 1978; and the memorandum of States Steamship Company and Pacific Far East Line, Inc. and exhibits thereto filed November 27, 1978.

the factually contested issue of rebating raised by the Sea-Land answers and counterclaims as recast by respondents in their July 24, 1978 motion to dismiss and formally ordered that:

> "On December 15, 1978 at 1:30 the parties shall submit to the Court a joint pretrial order with regard to the hearing . . ."[4]

On November 16, 1978, the District Court entered its "Order Appointing Special Master" for the purpose of determining which of certain documents in the possession of respondents were relevant to the issue of rebating raised by the Sea-Land answers and counterclaims and ought to be produced to petitioners for use in the course of the non-jury trial ordered by the Court pursuant to F.R.Civ.P. Rule 42(b).[5]

On November 22, 1978, the Special Master returned his written report to the District Court, reciting the fact that respondents had moved for dismissal of petitioners' complaints and for sanctions on the ground that petitioners had falsely represented that they did not engage in rebating. The Special Master recited that, as to the factual issue of rebating raised both by the Sea-Land answers and counterclaims and by respondents' motion to dismiss, respondents were in possession of documents falling within the below-specified "relevant categories":

> "(1) Documents tending to demonstrate that rebating was done only at lower levels; (2) documents tending

[4]Order, November 13, 1978, ¶ 17.
The Court had previously stated that with respect to the rebating issue that it would:
> ". . . pass upon what I consider to be actual facts and properly admissible facts as though this were an actual trial on this very issue." (Hearing, October 18, 1978, TR. p. 70:20-22.)

[5]Appendix L.

to show that management and counsel were unaware that rebating was occurring; (3) documents that would rebut the fact of rebating; or (4) documents that would substantiate a good faith belief that no rebating was occurring."[6]

On December 4, 1978, the District Court accepted the Report of the Special Master and the recommendations contained therein and ordered production to petitioners.[7]

The District Court elsewhere elaborated upon the procedure it intended to apply under F.R.Civ.P. Rule 42(b):

"[The Court]: You [respondents] will give consideration to the question of—I don't know whether you will or not, of waiver of jury trial."[8]

• • •

"[The Court]: . . . I expect you to come in with the equivalent of a pre-trial order on the trial of the factual issue involved in the motion to dismiss. . . . That means that you will get together and agree on a pre-trial order. . . . That order will comply with the usual order as though there were a full trial. . . . Of course, it's limited to the limited issue I'm going to try; but the documents will have to be exchanged. Names of witnesses will have to be exchanged. And [sic] the same fashion, as though it were a trial."[9]

On January 8, 1978, the District Court again announced that it fully intended to try the credibility of witnesses concerning the issue of rebating raised by the Sea-Land answers and counterclaims:

"The Court: The only thing you would be able to argue, when you get right down to it, in the Court of

[6]Report of Special Master, Appendix M, pp. 2, 3.

[7]Appendix N, p. 2.

[8]Hearing, October 18, 1979, TR. p. 208. Petitioners respectfully declined to waive jury trial.

[9]Hearing, November 3, 1978, TR. pp. 18, 19.

Appeals is your argument that the [District] Court is invading the province of the jury. That is what it is going to get down to.

"You can go through all kinds of exercises here, and it won't make any difference, very frankly.

"[Counsel for Petitioners]: . . . As I understood it, the previous contention by defendants was that the issue that the [District] Court is to decide is, one, whether or not PFEL did any rebating prior to October of 1976, whether States did any rebating prior to March of 1977 and, two, whether or not PFEL officials fraudulently denied making payments during that time period and whether States officials fraudulently denied making payments.

"The Court: Let me make one or two observations just to resolve this for the purpose of appeal. I think I am going to permit you to state to the Court of Appeals that one of the issues involved in the motion to dismiss includes defendants' contention that plaintiffs' witnesses committed perjury in connection with the issue of rebating prior to October 15, 1976. I will just put that down as one of the issues."[10]

[10]Hearing, January 8, 1978, TR. pp. 66, 67.

On January 9, 1979, the District Court entered its formal written order that it would conduct a non-jury trial on the issue of unclean hands and rebating raised by the Sea-Land answers and counterclaims including, *inter alia,* the contention by the defendants that:

"1(a) . . . plaintiffs PFEL and States have made representations to the Court and the parties which plaintiffs knew to be false. These false representations included the following:

"(ii) PFEL's denial, in its reply dated December 22, 1976, of paragraphs 27 and 29 of Sea-Land's

answer to amended complaint and counterclaim dated November 9, 1976;

"(iii) PFEL's denial, in its reply dated February 3, 1977, of paragraphs 38 and 40 of Sea-Land's answer to amended complaint and counterclaim dated January 7, 1977;

"(v) States' denial, in its reply served on July 12, 1977, of paragaphs 23 and 25 of Sea-Land's answer and counterclaim dated June 22, 1977."

The District Court and respondents recognize and agree that the fact of rebating by petitioners as alleged in the Sea-Land answers and counterclaims has not been established. Indeed, it is this precise issue of contested fact concerning which a non-jury trial has been ordered.[12]

Each of the other matters specified in the District Court's order of January 9, 1979 upon which respondents predicate their July 24, 1978 motion to dismiss is conceded to be inextricably tied to a resolution of the above-quoted issues of fact, *viz.*: the remaining issues under the order as to whether or not petitioners' answers to interrogatories;[13]

[11]Order, January 9, 1979, ¶¶ 1(a)(ii), (iii), (v). The denials of petitioners asserted by respondents as false have to do only with allegations made in the Sea-Land answers and counterclaims that petitioners paid rebates.

[12]The United States magistrate, in connection with his determination of a question of attorney-client privilege claimed by PFEL and referred to him by the District Court pursuant to 28 U.S.C. § 636(b)(1)(A), expressly found, after a full hearing, that rebating by PFEL as charged in the Sea-Land answer and counterclaim was "not a fact that is proven." Deposition, John I. Alioto, November 1, 1978, TR. p. 74:3-17.

[13]Order, January 9, 1979; (a)(vii)(viii), [petitioners' denials of rebating as alleged in the Sea-Land answers and counterclaims].

oral and written representations of counsel[14] and deposition testimony[15] were in fact false and the issue of whether petitioners in fact failed to produce documents evidentiary of or relevant to rebating[16] necessarily depend for their resolution upon a determination of whether petitioners in fact engaged in rebating as alleged in the answers and counterclaims filed by respondent Sea-Land.

On January 9, 1979, respondents acted, pursuant to the District Court's Order of November 13, 1978 and Rule 235-7 of the Local Rules of the United States District Court for the Northern District of California, to file their formal pretrial statement in which they undertook to identify the numerous witnesses and tens of thousands of documents which they contend will evidence the fact of rebating by petitioners as alleged in the Sea-Land answers and counterclaims and upon which they intend to rely during the course of the non-jury trial of said issue.

On January 16, 1979, petitioners filed their application for writ of mandamus with the United States Court of Appeals for the Ninth Circuit requesting relief from the District Court's Order of January 9, 1979 directing that petitioners submit to a non-jury trial on the issue of rebating as

[14]Order, January 9, 1979; (a)(iv)(vi)(x)(xi), [recitation of petitioners' counsel as to state of the record concerning petitioners' denials of rebating as alleged in the Sea-Land answers and counterclaims].

[15]Order, January 9, 1979; (i)(ix), [petitioners' deposition testimony denying rebating and the existence of documents relevant to rebating as alleged in the Sea-Land answers and counterclaims].

[16]Order, January 9, 1979; (b)(i)-(iv); [omnibus requests for and alleged failure to produce documents dealing with rebating by petitioners as alleged in the Sea-Land answers and counterclaims].

alleged in the Sea-Land answers and counterclaims. On April 20, 1979, the United States Court of Appeals for the Ninth Circuit denied petitioners' application for a writ of mandamus without opinion.

REASONS FOR GRANTING WRIT

A writ of certiorari should issue from this Court in order to restore to petitioners their right to jury trial guaranteed to them by the Seventh Amendment to the Constitution of the United States and by Rules 38(a) and 42(b) of the Federal Rules of Civil Procedure.

A. The Propriety of Mandamus.

Mandamus is the proper procedure to correct an effort by a lower Court to deprive an antitrust plaintiff, or for that matter any litigant, of his Constitutional right to trial by jury. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959); *Robine v. Ryan,* 310 F.2d 797 (2d Cir. 1962). Also see *Mach-Tronics v. Zirpoli,* 316 F.2d 820 (9th Cir. 1963). In *Beacon Theatres, supra,* the Supreme Court of the United States held that a mandamus proceeding to require the District Court to vacate certain orders alleged to deprive the petitioner of a jury trial of issues arising in the suit was proper:

> "... because 'Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care' (cite omitted)." 359 U.S. at 501.

The Court further held that:

> "... we think the right to grant mandamus to require jury trial where it has been improperly denied is settled." 359 U.S. at 511.

In even the dissenting opinion, the minority said:

> "There can be no doubt that a litigant is entitled to a writ of mandamus to protect a clear Constitutional or statutory right to a jury trial." 359 U.S. at 511.

In addition, the Supreme Court in *Beacon Theatres* specifically noted that:

> "... the right to trial by jury applies to treble damage suits under the antitrust laws and is, in fact, an essential part of the Congressional plan for making competition rather than monopoly the rule of trade. (cites omitted)." 359 U.S. at 504.

In its opinion in *Mach-Tronics v. Zirpoli, supra,* the Ninth Circuit vacated an order by the District Court staying the prosecution of a private antitrust suit. In doing so, the Court not only recognized that the:

> "propriety of the remedy by way of mandamus cannot be questioned for it is an aid of our ultimate jurisdiction on appeal," 316 F.2d at 834,

but also quoted from the *Beacon Theatres* case and noted the:

> "federal public policy which stems from the provisions of the Seventh Amendment"

as exemplified in the Supreme Court's decision in *Beacon Theatres,* 316 F.2d 828, 829.

B. The District Court's Order of January 9, 1979 Improperly Denies Petitioners' Right to Jury Trial.

Petitioners recognize the clear authority of a District Court to act under Rules 16 and 56 of the Federal Rules of Civil Procedure to simplify issues and/or to make deter-

minations as to the existence of a genuine issue of material fact.[17]

Petitioners are further mindful of the power of a District Court to entertain and grant a motion to dismiss on the basis of an admitted or uncontrovertible malfeasance.[18]

As noted, the District Court does not intend to employ the scheduled hearing in order to frame the issues as to which a trial shall proceed or make a determination as to whether there exists any genuine issues of material fact as provided in Rules 16 and 56 of the Federal Rules of Civil Procedure. To the contrary, the District Court has, in its order of January 9, 1979, and otherwise, stated that it intends to itself try and determine issues of fact raised by the pleadings and that it will do so in the face of petitioners' demand for jury trial. The announced course of

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[17]Federal Rules of Civil Procedure, Rule 16(1), Rule 56(c).

[18]The following cases are submitted as illustrative of the exercise by a district court of its power to impose sanctions under Rule 37 of the Federal Rules of Civil Procedure:

United States v. Moss-American, Inc., 78 F.R.D. 214 (E.D. Wis. 1978): confession of intentional falsification of key evidence by an expert witness.

Fox v. Studebaker-Worthington, Inc., 516 F.2d 989 (8th Cir. 1975): confession and conviction of criminal eavesdropping on adverse party in civil litigation.

Trans World Airlines, Inc. v. Hughes, 332 F.2d 602 (2d Cir. 1964), *cert. dismissed*, 380 U.S. 248, 249 (1965): deliberate refusal to comply with valid court order requiring that a party submit to deposition.

Link v. Wabash Railroad Co., 291 F.2d 542 (7th Cir. 1961): extremely prolonged dilatory conduct and an admitted, uncontested and unexplained failure to obey a court order requiring appearance at a pretrial conference.

Rohauer v. Eastin-Phelan Corporation, 499 F.2d 120 (8th Cir. 1974): repeated refusal to obey court orders requiring appearance and refusal to obey a court order to appear and show cause concerning non-compliance with said orders.

action by the District Court clearly impinges upon petitioners' Constitutional right to a jury trial and violates Rules 38(a) and 42(b) of the Federal Rules of Civil Procedure.

In *Mascuilli v. United States*, 313 F.2d 764 (3rd Cir. 1963), the court in a wrongful death action entered a pretrial order resolving the issue of liability. The Third Circuit held this to be error:

> "We have time and again held that summary judgments cannot be granted when there is a genuine issue as to a material fact presented by either of the parties to an action; that pre-trial procedures are not intended to serve as a substitute for the regular trial of cases, nor are they intended to transfer to the pre-trial conference judge the traditional jury function of resolving factual issues." *Id.* at 767.

In *Lynn v. Smith*, 281 F.2d 501 (3rd Cir. 1960) the court made the same point while criticizing the trial court for taking oral testimony at the pretrial stage:

> "In our view the receipt of 'oral statements by witnesses' in a pre-trial conference opens a 'Pandora's box in contemplation by those who so wisely conceived pre-trial procedures as a medium of expediting the trial of cases and not as a substitute for the regular trial process." *Id.* at 507.

In *Reynolds Metal Co. v. Metals Disintegrating Co.*, 176 F.2d 90 (3rd Cir. 1949), the Court noted:

> "[T]he Federal Rules of Civil Procedure . . . were designed to facilitate correlation, and not duplication, between the pretrial and trial proceedings. . . . We are satisfied that pre-trial proceedings are intended to determine *what* the issues are, and *not* to invade the

trial function of *resolving* those issues. *Id.* at 92. (Emphasis added.)

It is absolutely clear in our case that, although respondents' July 24, 1978 motion to dismiss is phrased in terms of Rules 16, 37, 56 and Rule 41(b) of the Federal Rules of Civil Procedure, the District Court has by its January 9, 1979 order and record statements clearly announced that it intends to actually conduct a separate non-jury trial of the issue of rebating by petitioners as raised by the answers and counterclaims of respondent Sea-Land. The District Court has itself stated that there has never been an admission of rebating as alleged by Sea-Land[19] and has stated that the key question of fact that it will proceed to try without a jury is whether or not petitioners engaged in rebating as charged. For example, with respect to PFEL the court stated:

"THE COURT: All right.

"Now, let's stop for a minute here. One of the questions, if not the crucial question is, did PFEL engage in rebating prior to October 15, 1976.

"[Counsel for Respondents]: Yes, sir.

"THE COURT: And your claim with relation to these three witnesses is that they did engage in such prior practices thereto?

"[Counsel for Respondents]: Yes.

"THE COURT: Now, I think it's reasonable to ask of the plaintiffs a very simple question:

"Do the plaintiffs contend that prior to October 15, 1976 they did not engage in rebating?

"[Counsel for Petitioners]: The plaintiffs did not."[20]

[19]Hearing, December 13, 1978, TR. p. 21, 22.

[20]Hearing, October 18, 1978, TR. p. 235.

It is undisputed from the explicit language of the District Court's order of January 9, 1979 and the statements of the District Court that, absent the relief prayed for herein, the District Court will, in the context of a separate trial ordered by it pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, act to try and to itself determine issues of fact raised by the July 24, 1978 motion to dismiss which are not only common but identical to the issues of fact raised by the Sea-Land answers and counterclaims concerning which petitioners have properly demanded jury trial. The District Court has thus announced its embarcation upon a course of judicial procedure pursuant to which it will, after weighing the credibility of witnesses, make findings of fact which not only might but will, according to the District Court, operate either by way of *res judicata* or collateral estoppel so as to conclude the parties with respect thereto in any subsequent proceedings.[21]

The constitutionally protected right to trial by jury, when properly demanded and not waived, cannot be said to depend upon the particular rule purportedly relied upon by an adverse party or a District Court in support of an assertion that jury trial is not required. *A fortiori,* where a District Court unequivocally announces its intention to hold a separate non-jury trial of issues of fact which by

[21]In addition to the announced intention of the District Court to try the critical issue of fact raised by the Sea-Land answers and counterclaims, the District Court has espoused the view that its findings of fact will be binding upon the parties and that the findings will be upheld by the Court of Appeals unless, upon review of the record, the Court of Appeals finds that the District Court made a "really clear error" and would be upheld unless it could be shown that, with respect to its findings, the District Court was "grossly wrong". Hearing, October 19, 1978, TR. p. 247; Hearing, December 13, 1978.

their very description are issues raised by the pleadings for which a jury demand has been made. The mere incantation of various of the Federal Rules of Civil Procedure or the "inherent powers" or a District Court is not sufficient to disallow a constitutionally protected right to jury trial of such issues.

The District Court's order of January 9, 1979 goes well beyond the proper judicial function of framing issues; it clearly requires that petitioners submit to a full trial on the issue of rebating raised by the Sea-Land answers and counterclaims and must be vacated.

CONCLUSION

For the reasons stated, the writ prayed for herein should be granted and the order of the Court of Appeals for the Ninth Circuit reversed.

Dated, San Francisco, California,
May 14, 1979

Respectfully submitted,

JOSEPH M. ALIOTO
LAWRENCE JOHN APPEL
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(Appendices Follow)

Appendices

Appendix A

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United States District Court
Northern District of California

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and McLean Industries, Inc., Defendants.	No. C 76 2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc. and R. J. Reynolds Tobacco Company, Defendants.	No. C 77 0582 AJZ

[January 9, 1979]

ORDER DIRECTING EVIDENTIARY HEARING

1. On July 24, 1978, defendants R. J. Reynolds Tobacco Company and Sea-Land Service, Inc. ("Sea-Land") served and filed their Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions. This motion was brought pursuant to Rules 16, 37(b), 41(b), and 56 of the Federal Rules of Civil Procedure, and sought an order dismissing the amended complaint of plaintiff Pacific Far East Line, Inc. ("PFEL") and the complaint of plaintiff States Steamship Company ("States"), and granting further sanctions, including an order directing plaintiffs to pay the full cost to defendants, including reasonable attorneys' fees, of defendants' discovery on the issue of rebating by plaintiffs. In support of this motion, defendants make the following contentions:

Defendants contend that:

(a) From the commencement of these actions to and including the present time, plaintiffs PFEL and States have made representations to the Court and the parties which plaintiffs knew to be false. These false representations included the following:

(i) The testimony of John I. Alioto, then the President of PFEL, at the deposition of PFEL by John I. Alioto on November 29, 1976, that PFEL did not rebate (John I. Alioto Dep., Nov. 29, 1976, pp. 67-70, 76-77);

(ii) PFEL's denial, in its reply dated December 22, 1976, of paragraphs 27 and 29 of Sea-Land's answer and counterclaim dated November 9, 1976;

(iii) PFEL's denial, in its reply dated February 3, 1977, of paragraphs 38 and 40 of Sea-Land's answer to amended complaint and counterclaim dated January 7, 1977;

(iv) The representation of PFEL's counsel to the Court on February 28, 1977 that PFEL was not engaged in rebate practices (Feb. 28, 1977 Tr. 16);

(v) States' denial, in its reply served on July 12, 1977, of paragraphs 23 and 25 of Sea-Land's answer and counterclaim dated June 22, 1977;

(vi) The representation of plaintiff's counsel to the Court on July 1, 1977 that plaintiffs had denied making any payments (July 1, 1977 Tr. 20);

(vii) The answers of PFEL to defendants' first interrogatories, served and filed on January 16, 1978 pursuant to the Court's Order of December 20, 1977, and particularly PFEL's answer to Interrogatory 4;

(viii) The answers of States to defendants' first interrogatories, served and filed on January 16, 1978 pursuant to the Court's Order of December 20, 1977, and particularly States' answer to Interrogatory 4;

(ix) The testimony of Ralph Walter Kreuger II, then the Director of Planning, Research, and Development for States, at the deposition of States by Mr. Kreuger on January 23, 1978, that the only documents identifying persons who had paid monies to customers of States were documents relating to cargo claims and correction notices (Kreuger Dep., Jan. 23, 1978, pp. 5-6);

(x) Plaintiffs' papers in response to defendants' first motion for sanctions, dated February 13, 1978, and particularly plaintiffs' affidavits averring that it would have been pointless for plaintiffs to search their sales files for rebating documents because they knew there were no such documents in their sales files (Genovese Aff., Feb. 13, 1978, Ex. A, pp. 8-9, Ex. B, pp. 6-7; Coghlan Aff., Feb. 13, 1978, par. 4); and

(xi) Plaintiffs' papers in response to defendants' Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions and plaintiffs' papers in response to defendants' Motions to Overrule Claims of Attorney-Client Privilege.

Defendants contend that:

(b) Plaintiffs have willfully failed to comply with repeated orders of the Court directing plaintiffs to produce documents in plaintiffs' possession and that of their agents relating to plaintiffs' rebating practices. The orders of the Court which plaintiffs have failed to obey include the following:

(i) Paragraphs 2 and 3 of the Court's Order of December 20, 1977;

(ii) Paragraph 9 of the Court's Order of February 28, 1978;

(iii) Paragraphs 2, 3, 4, 8, and 9 of the Court's Order of July 6, 1978; and

(iv) Paragraph 7 of the Court's Order of July 27, 1978.

2. Plaintiffs PFEL and States have filed papers in response to defendants' Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions, and defendants have filed papers replying to plaintiffs' papers. In their papers, plaintiffs deny defendants' contentions as set forth in paragraph 1 above.

3. The Court is satisfied that the contentions advanced by defendants in support of their Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions are a proper subject for an evidentiary hearing by the Court.

4. Plaintiffs have asserted that the factual issues raised by plaintiffs' denial of the contentions advanced by defendants in support of their Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions are matters to be decided by the jury in a jury trial and not by the Court in an evidentiary hearing.

IT IS HEREBY ORDERED that, commencing on January 29, 1979, at 10:00 A.M., the Court will conduct an evidentiary hearing on defendants' Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions.

Dated this 9th day of
January, 1979

ALFONSO J. ZIRPOLI

Alfonso J. Zirpoli
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

Pacific Far East Line, Inc. and States Steamship Company, Petitioners, vs. United States District Court for the Northern District of California, Respondent, and Sea-Land Service, Inc., and R. J. Reynolds Tobacco Company, et al., Real Parties in Interest.	No. 79-7017 D.C. # 76-2312 Northern Calif. ORDER

[April 20, 1979]

Before: SNEED and ANDERSON, Circuit Judges.

Upon due consideration, the petition for writ of mandamus is denied.

Appendix C

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United States District Court
Northern District of California

No. C76 2312 AJZ

Pacific Far East Line, Inc.,
Plaintiff,

vs.

R. J. Reynolds Tobacco Company, McLean Industries, Inc., and Sea-Land Service, Inc.,
Defendants.

[Filed Oct. 15, 1976]

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER FEDERAL ANTITRUST LAWS

(Jury Demanded)

Plaintiff Pacific Far East Lines, Inc. (hereinafter "PFEL"), demanding trial by jury, complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants under Sections 4 and 16 of the Clayton Antitrust Act (15 USC § 15 and 26) to secure damages for and injunctive relief against the violations by the named defendants of Sections 1 and 2 of the Sherman Antitrust Act (15 USC § 1 and 2) and Sections 2(c) and 7 of the Clayton Antitrust Act (15 USC § 13(c) and 18).

2. The defendants transact business, maintain an office and are found within the Northern District of California. Defendants are within the jurisdiction of this Court for the purpose of service of process. The interstate trade and commerce hereinafter described is in part carried on, and the acts done in violation of the antitrust laws hereinafter alleged, were performed, in part, within the Northern District of California.

II

THE PARTIES

3. The plaintiff PFEL is a Delaware corporation with its principle place of business in San Francisco, California. PFEL is engaged in the operation of freight transportation by American flag vessels to the Far East and the Persian Gulf. It utilizes LASH and Ro-Ro vessels from the West Coast and the East Coast.

4. The Defendant R. J. Reynolds Tobacco Company ("Reynolds") is a New Jersey corporation with its principle place of business in Winston-Salem, North Carolina. Reynolds is one of the nation's largest industrial corporations in sales and assets, reporting, in 1975, net sales in the amount of $4,837,643,000 and total assets in the amount of $3,294,322,000. Reynolds is the largest manufacturer of tobacco products in the United States. Reynolds is a significant exporter of cigarettes and is the largest importer of tobacco leaf into the United States. Through a series of acquisitions and mergers beginning about 1963, Reynolds has expanded its activities into areas other than tobacco. At least one of these acquisitions was the subject of an action brought by the United States under Section 7 of the Clayton Act which, on or about September, 1969, Reynolds was ordered to divest. In one of its largest acquisitions, Reynolds, on or about May, 1969, acquired the business and assets of the predecessor of the defendant McLean Industries, Inc. ("McLean").

5. The defendant McLean is a New York corporation and a wholly-owned subsidiary of Reynolds. McLean is the successor to the assets and the business of a corporation of the same name that was acquired by Reynolds on or about May, 1969. McLean is and was a holding company operating through a number of wholly-owned subsidiaries, the principle one of which, the defendant Sea-Land Service, Inc. ("Sea-Land"), accounted for most of the revenues of McLean's predecessor. McLean is one of the nation's largest transportation companies in sales and assets.

6. The defendant Sea-Land is a Delaware corporation which is a wholly-owned subsidiary of McLean. Sea-Land operates the largest containerized freight transportation system in the world, utilizing containers, containerships, chassis and related terminal equipment. Sea-Land operates in the domestic trade of the United States and in foreign

commerce. Between 1964 and 1975 Sea-Land's revenues from its containership operation rose from $84.7 million to approximately $768 million.

IV

CO-CONSPIRATORS

7. Certain corporations, persons, or entities participated in and made statements and performed acts in furtherance of the violations of the antitrust laws alleged in this Complaint.

V

TRADE AND COMMERCE

8. PFEL and Sea-Land are, and at all times relevant herein were, engaged in interstate and foreign commerce in the operation of their freight vessels throughout the world.

9. Sea-Land is on competitive routes against American Export, States Line, Waterman Steamship Line, Central Gulf, Prudential, APL, Lykes Line, and PFEL. The conspiracy and attempt to monopolize and the actual monopolization hereinafter alleged together with the conspiracies and contracts in restraint of trade, the commercial bribes and illegal rebates and acquisition of assets, were directed against all of these companies for the purpose of forcing them to lose substantial amounts of money while Sea-Land was subsidized in its below-cost operation by Reynolds, which in turn received huge subsidies from the United States Government through agricultural support programs and IRS tax shelter financing.

10. The trade and commerce involved herein are the transportation by common carriers by water in foreign

commerce of freight in containerships, in United States-flag containerships, LASH vessels and Ro-Ro vessels, and on various trade routes in such commerce.

11. A common carrier by water engages in water-borne transportation of passengers or property, and makes its services available to the general public at published tariffs on a first-come, first-served basis, operating regularly scheduled sailings on designated trade routes. A common carrier by water is to be distinguished from what is commonly called an ocean tramp, which engages in contracted water-borne transportation services for specific customers at negotiated rates. A common carrier by water in foreign commerce makes its regularly scheduled sailings on designated trade routes between United States ports and ports in foreign countries or in territories or possessions of the United States.

12. All military cargoes shipped by the Department of Defense or related agencies to foreign countries must be carried in vessels operating under the United States flag. All mails of the United States shipped to foreign countries must be carried on vessels operating under the United States flag.

14. Since 1966, when containerships and containerized shipping were introduced onto foreign trade routes on a major scale, there has been a radical transformation of world trade, the nature of port operations and the composition of the world's fleet of cargo ships. Containerships and LASH ships are rapidly replacing breakbulk ships on most key world trade routes.

15. American companies have taken the lead in the movement toward containerized, LASH and Ro-Ro transportation systems. Sea-Land operates the largest fleet of containerships in the world, with 31.6% of all containships operating in foreign commerce and 55% of all containerships operating in foreign commerce under the United States flag. Sea-Land's containerships represent one-third of all containership capacity in foreign commerce and one-half of all United States-flag containership capacity in foreign commerce.

VI

OFFENSES CHARGED

16. Commencing at least as early at 1964 and continuing to the present, Sea-Land and its parent McLean have attempted to monopolize, and are monopolizing the trade and commerce hereinabove described in violation of Section 2 of the Sherman Act, to the injury of PFEL's business and property.

17. Commencing at least as early at 1964 and continuing down to the present, Sea-Land, McLean, and Reynolds have combined and conspired with one another and with others to monopolize and to restrain the trade and commerce hereinabove described in violation of Sections 1 and 2 of the Sherman Act, to the injury of PFEL's business and property.

18. Commencing at a time unknown to plaintiffs, but beginning at least as early as 1971, and continuing up to at least 1975, Sea-Land paid $19 million to buyers, agents of buyers and other intermediaries acting for or on behalf of buyers, of shipping services in bribes and other illegal rebates in violation of Section 2(c) of the Clayton Act, to the injury of PFEL's business and property.

19. Within the last year, Sea-Land has acquired by purchase from a competitor certain LASH vessels to be used in the Middle East trade routes, which acquisition lessens competition and tends to create a monopoly in violation of Section 7 of the Clayton Act, to the injury of PFEL's business and property.

20. The said monopoly, conspiracy and attempt to monopolize, and conspiracies and bribes and illegal rebates and illegal acquisitions in restraint of trade have consisted of a concert of action by defendants to do the following things, among others:

(a) Operate below cost from hidden subsidies supplied by Reynolds to Sea-Land;

(b) Arrange intercompany accounting procedures between Reynolds and Sea-Land to conceal Sea-Land's below-cost operations;

(c) Subsidize Sea-Land's below-cost predatory tactics from the huge interstate and foreign treasuries of Reynolds, supplemented in turn by United States Government subsidies, direct and indirect, to Reynolds;

(d) Threaten to engage and actually engage in litigation, interferences and protests in courts and before government bureaus and agencies against American-flag operators for anti-competitive purposes and for the intended purpose of causing unnecessary litigation expenses and delays in the granting of governmental rights and licenses to American-flag competitors;

(e) Pay bribes and illegal political contributions at home and abroad using executives named Peoples, Wade and Smith as front men for the chief executive officers in order, among other things, to secure preferential berthing rights in the Persian Gulf.

(f) Threaten to adopt and adopt rebate policies to lower the revenues of American-flag competitors:

(g) Acquire competitive companies for the purpose of restraining and monopolizing trade;

(h) Over-tonnage trade for the purpose of driving American-flag competitors to bankruptcy;

(i) Utilize steamship conferences for the purpose of acting in concert against competitors like PFEL;

(j) Engage in predatory acts of commercial espionage, interference, and pricing against American-flag competitors;

(k) Acquire substantial interests in the oil industry for the purpose of gaining competitive leverage over American-flag competitors;

(l) Pay bribes and other illegal rebates to buyers of shipping services; and

(m) Maintain an off-book slush fund of cash from which they intended to pay and did pay commercial bribes and other illegal rebates.

21. The defendants did those things which as hereinabove alleged they conspired and agreed to do.

VII

EFFECTS OF THE VIOLATIONS

22. The intent and purpose of the foregoing violations of the law were to damage and destroy Sea-Land's American-flag competition so that Sea-Land would achieve a monopoly position in shipping operations between the United States and the world.

23. PFEL, beginning in August of 1974, has achieved efficiencies and management skills which gave it a better commercial position in the Far East and Persian Gulf. It has already suffered substantial damages from the predatory actions hereinabove alleged, but nevertheless succeeded in getting an advantageous beginning position by acquiring rights to routes to the Persian Gulf before the full potential of that trade and commerce was fully recognized. Upon learning of PFEL's position in the Persian Gulf, defendants' executives formulated a plan to monopolize the trade and commerce between the Persian Gulf, the Orient and the United States and reduced that plan to writing in a secret, confidential interoffice memorandum which is attached hereto as Exhibit A and incorporated herein by this reference. Exhibit A contains an admission that the plan is a "monopolistic foreign investment". Unless this Court intervenes, the said plan will be put into effect and will drive plaintiff PFEL and other American-flag carriers out of business in the Persian Gulf. Implementation of the plan set out in Exhibit A will be carried out by various predatory acts including without limitation: commercial bribery, commercial espionage, interference with contractual relations, below-cost operations, and baseless litigation and protests in the courts and before government agencies.

WHEREFORE, plaintiff prays:

1. That the Court adjudge and decree that:

(a) Defendants have attempted to monopolize and are monopolizing the trade and commerce hereinabove described, in violation of Section 2 of the Sherman Act;

(b) Defendants have combined and conspired with one another and with others to monopolize and to restrain the trade and commerce hereinabove described, in violation of Sections 1 and 2 of the Sherman Act;

(c) The acquisition by defendant Reynolds of the business and assets of McLean is in violation of Section 7 of the Clayton Act;

(d) The acquisition by defendants of the business and assets of U. S. Lines is in violation of Section 7 of the Clayton Act;

(e) The contemplated acquisition by defendant Reynolds of a substantial position in the oil industry is a violation of Section 7 of the Clayton Act; and

(f) Defendants have paid commercial bribes and illegal rebates in violation of Section 2(c) of the Clayton Act.

2. That defendants and each of them be permanently enjoined from performing or carrying out each and every one of the unlawful acts, practices, contracts, combinations and conspiracies alleged in this complaint, including the plan to enter into a "monopolistic investment" in the Persian Gulf.

3. That Reynolds be ordered to divest itself of all ownership interest in McLean and Sea-Land.

4. That plaintiff recover its damages, trebled as required by Section 4 of the Clayton Act;

5. That plaintiff be awarded reasonable attorneys' fees and its costs of litigation as required by Section 4 of the Clayton Act; and

6. That plaintiff be granted such other and further relief as the Court may deem just and proper.

LAW OFFICES OF JOSEPH L. ALIOTO
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JOSEPH M. ALIOTO
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By /s/ JOSEPH M. ALIOTO

Joseph M. Alioto
Attorney for Plaintiff

Pursuant to Rule 38(b), Fed.R. Civ.P., plaintiff hereby makes demand for jury trial.

Appendix D

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In the United States District Court
For the Northern District of California

No. C76 2312 AJZ

Pacific Far East Line, Inc.,
Plaintiff,

vs.

R. J. Reynolds Tobacco Company, McLean Industries, Inc., and Sea-Land Service, Inc.,
Defendants.

ANSWER AND COUNTERCLAIM OF DEFENDANT SEA-LAND SERVICE, INC.

Defendant Sea-Land Service, Inc. ("Sea-Land"), for its answer to the Complaint herein, admits, denies and alleges as follows:

1. Denies each and every allegation contained in paragraph 1, except admits and alleges that plaintiff purports to bring this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

2. Denies each and every allegation contained in paragraph 2, except admits and alleges that Sea-Land is qualified to do business in the State of California and is found within the Northern District of California.

3. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 3, except admits and alleges upon information and belief that plaintiff Pacific Far East Line, Inc. ("PFEL") is a Delaware corporation with its principal place of business in San Francisco, California and is engaged in the operation of freight transportation by American flag vessels to the Far East and the Persian Gulf.

4. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 4, except admits and alleges that defendant R. J. Reynolds Tobacco Company ("Reynolds Tobacco") is a New Jersey corporation with its principal place of business in Winston-Salem, North Carolina.

5. Denies each and every allegation contained in paragraph 5, except (a) admits and alleges that defendant McLean Industries, Inc. ("McLean") is a corporation organized under the laws of the State of Delaware, (b) admits and alleges that McLean is a holding company with a number of wholly-owned subsidiaries, including Sea-Land, (c) admits and alleges that Sea-Land accounted for most

of the revenues of McLean's predecessor, (d) admits and alleges that McLean is the successor to the assets and business of a corporation of the same name that was acquired by Reynolds Tobacco in May 1969, and (e) is without knowledge or information sufficient to form a belief as to the truth of the allegation that McLean is one of the nation's largest transportation companies in sales and assets.

6. Denies each and every allegation contained in paragraph 6, except (a) admits and alleges that Sea-Land is a corporation organizezd under the laws of the State of Delaware and is a wholly-owned subsidiary of McLean, (b) is without knowledge or information sufficient to form a belief as to the truth of the allegation that Sea-Land operates the largest containerized freight transportation system in the world utilizing containers, containerships, chassis and related terminal equipment, (c) admits and alleges that Sea-Land operates in the domestic trade of the United States and in foreign commerce, and (d) admits and alleges that in 1964 Sea-Land's revenues from its containership operation were $83,905,646 and that in 1975 Sea-Land's revenues from its containership operation were $759,423,098.

7. Denies each and every allegation contained in paragraph 7.

8. Denies each and every allegation contained in paragraph 8, except (a) admits and alleges upon information and belief that PFEL engages in foreign commerce, and (b) admits and alleges that Sea-Land engages in interstate and foreign commerce.

9. Denies each and every allegation contained in paragraph 9, except admits and alleges that Sea-Land operates competitive services to ports also served by one or more of the carriers named in paragraph 9 as well as other carriers.

10. Denies each and every allegation contained in paragraph 10.

11. Denies each and every allegation contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12.

13. There is no paragraph 13.

14. Denies each and every allegation contained in paragraph 14, except admits and alleges that since 1966 there have been changes in world trade, the nature of port operations and the composition of the world's fleet of cargo ships.

15. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 15, except admits and alleges that American companies have been active in the movement toward containerized, LASH and Ro-Ro transportation systems.

16. Denies each and every allegation contained in paragraph 16.

17. Denies each and every allegation contained in paragraph 17.

18. Denies each and every allegation contained in paragraph 18, except admits and alleges that a corporate investigation has concluded that more than $19 million in possibly illegal rebates has been paid by Sea-Land to shippers, consignees and forwarding agents during the period 1971 through 1975.

19. Denies each and every allegation contained in paragraph 19.

20. Denies each and every allegation contained in paragraph 20, except admits and alleges that Sea-Land paid possibly illegal rebates as referred to in paragraph 18 above which were paid in part from off-book funds.

21. Denies each and every allegation contained in paragraph 21.

22. Denies each and every allegation contained in paragraph 22.

23. Denies each and every allegation contained in paragraph 23.

FIRST AFFIRMATIVE DEFENSE

24. Plaintiff is barred from receiving relief from this Court by the doctrine of unclean hands.

SECOND AFFIRMATIVE DEFENSE

25. The claims asserted in the Complaint herein are barred in whole or in part by the applicable statute of limitations, Section 4B of the Clayton Act, 15 U.S.C. § 15b.

THIRD AFFIRMATIVE DEFENSE

26. The claims asserted in the complaint herein are in whole or in part within the primary jurisdiction of the

Federal Maritime Commission and are therefore not properly before this Court at this time.

FOURTH AFFIRMATIVE DEFENSE

27. Upon information and belief, PFEL, acting directly or through agents and others, has knowingly paid, authorized and aided and abetted the payment of rebates and other payments in contravention of PFEL's applicable conference agreements and PFEL's applicable tariffs to shippers, consignees, forwarding agents and other buyers of PFEL's services and to persons employed by shippers, consignees, forwarding agents and other buyers of PFEL's services. Upon information and belief, PFEL, acting directly or through agents and others, has also engaged in, authorized and aided and abetted other practices in contravention of PFEL's applicable conference agreements and tariffs. Upon information and belief, such payments and practices began before 1968 and are still continuing. Upon information and belief, such payments and practices have been made for the purpose and with the effect of disadvantaging competitors of PFEL, including Sea-Land. Upon information and belief, PFEL has knowingly failed to disclose, or has issued false denials of, the existence of such payments and practices to the Maritime Administration of the United States Department of Commerce in connection with PFEL's application for and receipt of operating differential subsidy ("ODS") payments from the United States Government, as well as to the Federal Maritime Commission, the Securities and Exchange Commission, other agencies of the United States Government and the general public. Upon information and belief, such failure

to disclose and such denials were done for the purpose and with the effect of receiving ODS payments and of disadvantaging competitors of PFEL, including Sea-Land.

28. In view of the facts alleged in paragraph 27, any acts of Sea-Land complained of herein were performed in self-defense against illegal and fraudulent acts of PFEL and others and were performed without any purpose or effect of restraining competition. Such acts of Sea-Land did not violate any of the United States antitrust laws.

COUNTERCLAIM

29. Sea-Land realleges each and every allegation contained in paragraph 27.

30. The acts of PFEL in failing to disclose, or in issuing false denials of, the existence of rebates and other payments and other practices alleged in paragraphs 27 and 29 above constitute violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as of other Federal statutes. The acts of PFEL alleged in paragraphs 27 and 29 above also constitute unlawful fraud and intentional infliction of business injury upon Sea-Land.

31. The unlawful acts of PFEL alleged in paragraphs 27 and 29 above injured and are continuing to injure Sea-Land in its business and property.

WHEREFORE, defendant Sea-Land Service, Inc. ("Sea-Land") prays judgment against plaintiff Pacific Far East Line, Inc. ("PFEL"):

1. Dismissing the Complaint;

2. Adjudging and declaring that the acts of PFEL alleged in paragraphs 27 and 29 above constitute violations

of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and enjoining and restraining PFEL and all persons acting in concert and participation with PFEL from engaging in any such acts;

3. Awarding Sea-Land treble the amount of its damages sustained by reason of the acts alleged in paragraphs 27 and 29 above, as required by Section 4 of the Clayton Act, 15 U.S.C. § 15;

4. Awarding Sea-Land its costs of litigation and reasonable attorney's fees, as required by Section 4 of the Clayton Act, 15 U.S.C. § 15; and

5. Granting Sea-Land such other and further relief as may be just and proper.

Dated: November 9, 1976

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BROBECK, PHLEGER & HARRISON

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Appendix E

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United States District Court
Northern District of California

No. C 76-2312 AJZ

Pacific Far East Lines, Inc.,
Plaintiff,
vs.
R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and McLean Industries, Inc.,
Defendants.

[Filed Dec. 17, 1976]

AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER FEDERAL ANTITRUST LAWS
(Jury Demanded)

Plaintiff Pacific Far East Lines, Inc. (hereinafter "PFEL"), demanding trial by jury, complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This Amended Complaint is filed and these proceedings are instituted against the named defendants under Sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) to secure damages for and injunctive relief against the violations by the named defendants of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Sections 2(c), 3 and 7 of the Clayton Act (15 U.S.C. §§ 13(c), 14 and 18).

2. Defendants, and each of them, transact business, maintain an office, have agents and employees, and are found within the Northern District of California. Defendants, and each of them, are within the jurisdiction of this Court for the purpose of service of process. The interstate trade and commerce hereinafter described is in part carried on, and the acts done in violation of the antitrust laws hereinafter alleged, were performed, in part, within the Northern District of California.

3. Defendant R. J. Reynolds Industries, Inc. [hereinafter "INDUSTRIES"] owns and controls one hundred per cent (100%) of the stock of R. J. Reynolds Tobacco Company [hereinafter "TOBACCO"], Sea-Land Service, Inc. [hereinafter "SEA-LAND"], McLean Industries, Inc. [hereinafter "McLEAN"], R. J. Reynolds Leasing Company [hereinafter "LEASING"], American Independent Oil Company [hereinafter "AMINOIL"], R. J. R. Foods, Inc., R. J. Reynolds Tobacco International, S.A., MacDonald Tobacco, Inc. and R. J. Reynolds Tobacos do Brasil Ltda.

4. SEA-LAND and TOBACCO have, since 1970, operated as agents-in-fact for INDUSTRIES within the Northern District of California and elsewhere.

5. Defendant INDUSTRIES has, through its officers and special staff, provided overall guidance and coordination for the business of TOBACCO and SEA-LAND on a regular basis since 1970.

6. Since 1970, SEA-LAND has reported and consulted monthly and, at times, daily to and with INDUSTRIES on the business operations of SEA-LAND, including the business of SEA-LAND within the Northern District of California.

7. Since 1970, TOBACCO has reported and consulted monthly, and, at times, daily to and with INDUSTRIES on the business operations of TOBACCO, including the business operations of TOBACCO within the Northern District of California.

8. INDUSTRIES has for each year since 1970 prepared and approved an annual operational budget which includes the required or anticipated business expenditures for all of its subsidiary companies, including SEA-LAND and TOBACCO, and which includes the business expenditures required or anticipated by SEA-LAND and TOBACCO for the conduct of their business in the Northern District of California.

9. Each of the subsidiary companies of INDUSTRIES, including SEA-LAND and TOBACCO, are operationally financed directly by INDUSTRIES on an annual basis.

10. INDUSTRIES has, since 1970, regularly acted within the Northern District of California to provide SEA-LAND and TOBACCO with credit, legal, accounting, financial, public relations and other services perceived by SEA-LAND, TOBACCO, and INDUSTRIES as necessary to the business of SEA-LAND and TOBACCO within said District.

11. INDUSTRIES has travelled to San Francisco, California on a regular basis since 1970 to consult with security analysts and others to the end of furthering the business opportunities and profits of INDUSTRIES and its subsidiary companies.

12. INDUSTRIES financed and maintains a direct financial interest in and exercises control over ships and containers employed and berthed in the Northern District of California.

13. Since 1970, INDUSTRIES has acted to purchase ships and containers located in the Northern District of California and, in that connection, has travelled into the Northern District of California.

14. Since 1972, the business of INDUSTRIES has been, in part, to directly provide policy and operational guidance, money, expertise and other things and services to its subsidiaries, including SEA-LAND and TOBACCO, for business conducted within the Northern District of California.

15. Since 1972, INDUSTRIES has travelled into the Northern District of California to observe the business functions of SEA-LAND and TOBACCO and to consult

with management and employees of SEA-LAND and TOBACCO and to inspect and appraise assets in which it maintains an economic interest.

16. INDUSTRIES particularly characterized its business operations in its 1975 100th Anniversary Report to Shareholders as follows: "Under the holding company structure, Reynolds Industries would provide coordinated and centralized financial, administrative, personnel, public relations and other services, as well as overall management, for the subsidiaries."

II

THE PARTIES

17. PFEL is a Delaware corporation with its principal place of business in San Francisco, California. PFEL is engaged in the operation of freight transportation by American Flag vessels to the Far East and the Persian Gulf. It utilizes LASH and Ro-Ro vessels from the West Coast and the East Coast.

18. R. J. Reynolds Industries, Inc. is a corporation which, since 1970, has been engaged as a manufacturer and seller of tobacco, food and packaging products, and as a producer, refiner and seller of oil and oil products and has, since 1970, continuously been engaged in the business of shipping freight by sea and by land in interstate and in foreign commerce.

19. R. J. Reynolds Tobacco Company is a New Jersey corporation with its principal place of business in Winston-Salem, North Carolina and is the largest manufacturer of tobacco products in the United States. Through a series of

acquisitions and mergers beginning about 1963, R. J. Reynolds Tobacco Company has expanded its activities into areas other than tobacco. At least one of these acquisitions was the subject of an action brought by the United States under Section 7 of the Clayton Act which, on or about September, 1969, R. J. Reynolds Tobacco Company was ordered to divest. In one of its largest acquisitions, R. J. Reynolds Tobacco Company in May, 1969, acquired the business and assets of the predecessor of the defendant McLean Industries, Inc.

20. McLean Industries, Inc. is a Delaware corporation and a wholly-owned subsidiary of INDUSTRIES. McLEAN is the successor to the assets and the business of a corporation of the same name that was acquired by TOBACCO in May, 1969. McLean Industries, Inc. is and was a holding company operating through a number of wholly-owned subsidiaries, the principle one of which, Sea-Land Service, Inc., accounted for most of the revenues of McLean's predecessor.

21. Sea-Land Service, Inc. is a Delaware corporation which is a wholly-owned subsidiary of McLean Industries, Inc. Sea-Land Service, Inc. operates the largest containerized freight transportation system in the world, utilizing containers, containerships, chassis and related terminal equipment. Sea-Land Service, Inc. operates in the domestic trade of the United States and in foreign commerce. Between 1964 and 1975, the revenues from the containership operation of Sea-Land Service, Inc. rose from $84.7 million to approximately $768 million.

21(a). R. J. Reynolds Leasing Company is a wholly-owned subsidiary corporation of INDUSTRIES and leases ships and containers to SEA-LAND.

III

CO-CONSPIRATORS

22. Certain corporations, persons or entities participated in and made statements and performed acts in furtherance of the violations of the antitrust laws alleged in this Amended Complaint.

IV

TRADE AND COMMERCE

23. PFEL and SEA-LAND are, and at all times relevant herein were, engaged in interstate and foreign commerce in the operation of their freight vessels throughout the world.

24. SEA-LAND has directly competed against PFEL on various routes since 1965 and, in the course of that competition, has in the past wrongfully employed and does now wrongfully employ investment tax credits and other preferential tax treatment received by INDUSTRIES and subsidiaries of INDUSTRIES against and to the competitive detriment of plaintiff.

25. The trade and commerce involved herein are the transportation by common carriers by water in foreign commerce of freight in containerships, in United States-flag containerships, LASH vessels and Ro-Ro vessels, and on various trade routes in such commerce.

26. A common carrier by water engages in water-borne transportation of passengers or property, and makes its

services available to the general public at published tariffs on a first-come, first-served basis, operating regularly scheduled sailings on designated trade routes. A common carrier by water is to be distinguished from what is commonly called an ocean tramp, which engages in contracted water-borne transportation services for specific customers at negotiated rates. A common carrier by water in foreign commerce makes its regularly scheduled sailings on designated trade routes between United States ports and ports in foreign countries or in territories or possessions of the United States.

27. All military cargoes shipped by the Department of Defense or related agencies to foreign countries must be carried in vessels operating under the United States flag. All mails of the United States shipped to foreign countries must be carried on vessels operating under the United States flag.

28. Since 1966, when containerships and containerized shipping were introduced onto foreign trade routes on a major scale, there has been a radical transformation of world trade, the nature of port operations and the composition of the world's fleet of cargo ships. Containerships and LASH ships are rapidly replacing breakbulk ships on most key world trade routes.

29. American companies have taken the lead in the movement toward containerized, LASH and Ro-Ro transportation systems. SEA-LAND operates the largest fleet of containerships in the world, with 31.6% of all containerships operating in foreign commerce and 55% of all containerships operating in foreign commerce under the

United States flag. SEA-LAND's containerships represent one-third of all containership capacity in foreign commerce and one-half of all United States-flag containership capacity in foreign commerce.

V

OFFENSES CHARGED

30. Defendants and each of them have, since 1964 and continuing to the date of this Amended Complaint, performed acts and contracted, combined and conspired between and among themselves and with others to unreasonably restrain the trade and commerce hereinabove described and have contracted, combined and conspired between and among themselves and with others to monopolize and have attempted to monopolize and monopilized the trade and commerce hereinabove described, all in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Sections 2(c), 3 and 7 of the Clayton Act (15 U.S.C. §§ 13(c), 14 and 18).

31. The acts, contracts, combinations, conspiracies and violations alleged at Paragraph 30 above have consisted, in part, of the following acts, practices and courses of conduct, all performed and undertaken by defendants, and each of them, with the express and predatory purpose and intent of eliminating the actual and potential competition of plaintiff and injuring plaintiff in its business and property:

(a) Unlawfully paying nineteen million dollars ($19,000,000.00) in rebates to shippers, consignees and forwarding agents during the period 1971 through 1975;

(b) Unlawfully paying more than twenty million dollars ($20,000,000.00) in excess commissions to shipping agents, buyers, and agents of buyers during the period 1971 through 1975 and failing to disclose the fact of said payments;

(c) Acquiring by purchase from a competitor certain LASH vessels for use in trade with the Middle East;

(d) Leasing and selling goods, equipment, supplies and other commodities, including shipping containers, and fixing the price charged therefor on the condition that the lessees and purchasers of said goods, supplies and other commodities not use or deal in the goods, equipment, supplies and commodities of competitors of defendants, including plaintiff and on the further condition that said goods, supplies and other commodities not be sold to or used by competitors of defendants, including plaintiff;

(e) Agreeing to operate and operating R. J. Reynolds Leasing Company, Sea-Land Service, Inc. and other subsidiaries of INDUSTRIES below cost;

(f) Filing a counterclaim in this action and seeking to disqualify counsel for plaintiff from the further prosecution of this action;

(g) Arranging and following intercompany accounting procedures for the purpose of concealing the fact of below-cost operation by SEA-LAND, LEASING and other subsidiaries of INDUSTRIES;

(h) Subsidizing SEA-LAND's below-cost predatory tactics from the huge interstate and foreign treasuries of INDUSTRIES supplemented in turn by United States Government subsidies, direct and indirect, to INDUSTRIES;

(i) Threatening to engage and actually engaging in litigations, interferences and protests in courts and before government bureaus and agencies against America-flag operators for anti-competitive purposes and for the intended purpose of causing unnecessary litigation expenses and delays in the granting of governmental rights and licenses to American-flag competitors;

(j) Paying unlawful bribes and political contributions in the United States and elsewhere in an effort to increase monies and profits available to defendants for purposes of competing against plaintiff and to unlawfully affect shipping regulations, tariffs and laws and to secure preferential berthing rights in the Persian Gulf and elsewhere;

(k) Agreed to deal reciprocally between and among themselves to the intended detriment of plaintiff;

(l) Threatening to adopt and adopting rebate policies to lower the revenues of American-flag competitors;

(m) Acquiring competitive companies for the purpose of restraining and monopolizing trade;

(n) Over-tonnage trade for the purpose of driving American-flag competitors to bankruptcy;

(o) Utilizing steamship conferences for the purpose of acting in concert against competitors, including plaintiff;

(p) Engaging in predatory acts of commercial espionage, interference, and pricing against American-flag competitors;

(q) Acquiring substantial interests in the oil industry for the purpose of gaining competitive leverage over American-flag competitors;

(r) Paying bribes and other illegal rebates to buyers of shipping services;

(s) Maintaining off-book slush funds of cash from which they intended to pay and did pay commercial bribes and other illegal rebates;

(t) Refusing to promptly produce the report of the Audit Committee of the Board of Directors of INDUSTRIES in response to request therefor made by plaintiff;

(u) Providing fuel to SEA-LAND at cost or below cost.

VI
EFFECT OF VIOLATIONS

32. As a direct and proximate result of the foregoing acts, contracts, combinations and conspiracies, plaintiff has suffered substantial monetary damages to its business and property in an amount not yet ascertained. When the

amounts of said damages are ascertained, they will be inserted into this Amended Complaint.

33. As a direct and proximate result of the foregoing acts, contracts, combinations and conspiracies, competition in and for the interstate and foreign trade and commerce described herein has been substantially diminished and potential competition unlawfully reduced.

34. PFEL, beginning in August of 1974, has achieved efficiencies and management skills which gave it a better commercial position in the Far East and the Persian Gulf. It has already suffered substantial damages from the predatory actions hereinabove alleged, but nevertheless succeeded in getting an advantageous beginning position by acquiring rights to routes to the Persian Gulf before the full potential of that trade and commerce was fully recognized. Upon learning of PFEL's position in the Persian Gulf, defendants' executives formulated a plan to monopolize the trade and commerce between the Persian Gulf, the Orient and the United States and reduced that plan to writing in a secret, confidential interoffice memorandum which is attached hereto as Exhibit A and incorporated herein by this reference. Exhibit A contains an admission that the plan is a "monopolistic foreign investment." Unless this Court intervenes, the said plan will be put into full effect and will drive plaintiff out of business in the Persian Gulf. Implementation of the plan set out in Exhibit A will be carried out by various predatory acts including without limitation: commercial bribery, commercial espionage, interference with contractual relations, below-cost operations, and baseless litigation and protests in the courts and before government agencies.

WHEREFORE, plaintiff prays judgment as follows:

1. That Defendants and each of them violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Section 2(c), 3 and 7 of the Clayton Act;

2. That Defendants and each of them be permanently enjoined from performing or carrying out each and every one of the unlawful acts, practices, contracts, combinations and conspiracies alleged in this complaint, including the plan to enter into a "monopolistic investment" in the Persian Gulf;

3. That INDUSTRIES be ordered to divest itself of all ownership interest in McLEAN and SEA-LAND;

4. That plaintiff recover its damages, trebled as required by Section 4 of the Clayton Act;

5. That plaintiff be awarded reasonable attorneys' fees and its costs of litigation as required by Section 4 of the Clayton Act; and

6. That plaintiff be granted such other and further relief as the Court may deem just and proper.

DATED: December 17, 1976

Law Offices of Joseph L. Alioto
Joseph L. Alioto
Joseph M. Alioto
Lawrence John Appel
By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel

One of the Attorneys for Plaintiff

Pursuant to Rule 38(b), Fed.R.Riv.P., plaintiff hereby makes demand for jury trial.

By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel
One of the Attorneys for Plaintiff

Appendix F

Law Offices of Joseph L. Alioto
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Telephone: (415) 434-2100
Attorneys for Plaintiff

United States District Court
Northern District of California

No. C-76-2312-AJZ

Pacific Far East Lines, Inc.,
Plaintiff,

vs.

R. J. Reynolds Industries, Inc.,
R. J. Reynolds Tobacco Company,
R. J. Reynolds Leasing Company,
Sea-Land Service, Inc., and
McLean Industries, Inc.,
Defendants.

And Related Cross-Actions

[Filed Dec. 23, 1976]

REPLY TO COUNTERCLAIM OF DEFENDANT SEA-LAND SERVICE, INC. AND COUNTERCLAIM OF PACIFIC FAR EAST LINES, INC.

(Jury Demanded)

Plaintiff-Counterdefendant Pacific Far East Lines, Inc. (hereinafter "PFEL") replies to the counterclaim of defendant Sea-Land Service, Inc. (hereinafter "SEA-LAND") on file herein and admits, denies and alleges as follows:

1. Denies generally and specifically each and every allegation contained at Paragraph 29 of said counterclaim and specifically denies that PFEL, acting directly or through agents and/or others, has knowingly paid, authorized or aided or abetted the payment of rebates or other payments in contravention of PFEL's applicable conference agreements and/or PFEL's applicable tariffs to shippers, consignees, forwarding agents and/or other buyers of PFEL's services and/or to persons employed by shippers, consignees, forwarding agents and/or other buyers of PFEL's services. PFEL further specifically denies that it has in any manner acted directly or through agents and/or others to engage in or to authorize or aid or abet other practices in contravention of PFEL's applicable conference agreements or tariffs or any of them. PFEL further specifically denies each and every of the allegations of Paragraph 27 of the answer of defendant SEA-LAND to the complaint on file herein to the extent that said allegations or any of them have been incorporated in or realleged at Paragraph 29 of the counterclaim herein.

2. PFEL denies generally and specifically each and every of the allegations contained at Paragraph 30 of the counterclaim herein.

3. PFEL denies the allegations contained at Paragraph 31 of the counterclaim herein and alleges specifically that

SEA-LAND has not suffered and is not continuing to suffer any injury whatsoever to its business or property.

FIRST AFFIRMATIVE DEFENSE

4. The claims asserted in the counterclaim of SEA-LAND herein are barred in whole or in part by the applicable statute of limitations, Section 4(b) of the Clayton Act 15 U.S.C. § 15(b).

SECOND AFFIRMATIVE DEFENSE

5. The claims asserted in the counterclaim of SEA-LAND herein are in whole or in part within the primary jurisdiction of the Federal Maritime Commission and are therefore not properly before this Court at this time.

THIRD AFFIRMATIVE DEFENSE

6. The counterclaim of SEA-LAND has failed to state a claim against PFEL upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

7. SEA-LAND is barred in whole or in part from receiving the relief sought in the counterclaim herein under the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

8. The claims asserted in the counterclaim of SEA-LAND herein are barred in whole or in part by the doctrine of *laches*.

SIXTH AFFIRMATIVE DEFENSE

9. SEA-LAND lacks standing to assert the claims alleged against PFEL herein.

SEVENTH AFFIRMATIVE DEFENSE

10. The counterclaim of SEA-LAND fails to comply with Rules 8(a) and 8(e) of the F.R.Civ.P.

EIGHTH AFFIRMATIVE DEFENSE

11. The claims of SEA-LAND herein fail in whole or in part to state a claim against PFEL upon which relief can be granted because of the immunity of PFEL due to Government action.

COUNTERCLAIM OF PFEL

12. PFEL realleges and incorporates herein by reference each and every allegation contained in PFEL's First Amended Complaint for damages and injunctive relief under Federal antitrust laws, filed December 17, 1976.

13. The counterclaim of SEA-LAND was filed by SEA-LAND acting as agent for the other defendants herein and was brought in bad faith in furtherance of the violations alleged by PFEL in its First Amended Complaint herein and for the purpose and with the intent of eliminating competition and restraining trade in American flag ship freight transportation, and in particular to eliminate and restrain PFEL as a viable competitor in said freight transportation, all in violation and in furtherance of defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 and Sections 2(c), 3 and 7 of the Clayton Act 15 U.S.C. §§ 13(c), 14 and 18.

14. The unlawful acts of SEA-LAND alleged in Paragraphs 12 and 13 above injured and are continuing to injure PFEL and its business and property.

WHEREFORE, plaintiff PFEL prays judgment against defendant and counterclaimant SEA-LAND:

(1) Dismissing the counterclaim of SEA-LAND herein;

(2) Adjudging and declaring that defendants and each of them have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, Sections 2(c), 3 and 7 of the Clayton Act, 15 U.S.C. §§ 13(c), 14 and 18;

(3) That defendants and each of them be permanently enjoined from performing or carrying out each and every one of the unlawful acts, practices, contracts, combinations and conspiracies alleged in this counterclaim and PFEL's First Amended Complaint herein, including the plan to enter into a "monopolistic investment" in the Persian Gulf;

(4) That R. J. Reynolds Industries, Inc. be ordered to divest itself of all ownership and interest in McLean Industries, Inc. and SEA-LAND;

(5) That PFEL recover its damages trebled as required by Section 4 of the Clayton Act;

(6) That PFEL be awarded reasonable attorneys' fees and its costs of litigation as required by Section 4 of the Clayton Act; and

(7) That PFEL be granted such other and further relief as the Court may deem just and proper.

DATED: December 22, 1976.

Law Offices of Joseph L. Alioto
Joseph L. Alioto
Joseph M. Alioto
Lawrence John Appel
Judith A. Genovese

By /s/ JUDITH A. GENOVESE
Judith A. Genovese

Pursuant to Rule 38(b) F.R.Civ.P. PFEL hereby makes demand for jury trial on all issues raised by the counterclaim of SEA-LAND, PFEL's reply thereto and the counterclaim of PFEL.

By /s/ JUDITH A. GENOVESE
Judith A. Genovese
One of the attorneys for PFEL

CERTIFICATE OF SERVICE BY MAIL

JUDITH A. GENOVESE hereby certifies:

That her business address is 111 Sutter Street, San Francisco, California 94104; that she is an active member of the State Bar of California and that she is not a party to the cause.

That on the date hereof she served a copy of:

Reply to Counterclaim of Defendant Sea-Land Service, Inc. and Counterclaim of Pacific Far East Lines, Inc. (Jury Demanded)

on each of the following, by placing one copy of said document in an envelope, addressed, respectively, as follows:

Moses Lasky
Charles B. Cohler
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104.
Lawrence E. Walsh
Richard E. Nolan
Davis, Polk & Wardwell
1 Chase Manhattan Plaza
New York, N.Y. 10005.

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States mail at San Francisco, California.

DATED: December 23, 1976.

/s/ JUDITH A. GENOVESE
Judith A. Genovese

Appendix G

Moses Lasky
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Attorneys for Defendants
R. J. Reynolds Tobacco Company
and Sea-Land Service, Inc.

In the United States District Court for the
Northern District of California

No. C76 2312 AJZ

Pacific Far East Line, Inc.,
Plaintiff,

vs.

R. J. Reynolds Industries, Inc.,
R. J. Reynolds Tobacco Company,
R. J. Reynolds Leasing Company,
Sea-Land Services Inc., and
McLean Industries, Inc.,
Defendants.

ANSWER TO AMENDED COMPLAINT AND COUNTERCLAIM OF DEFENDANT SEA-LAND SERVICE, INC.

Defendant Sea-Land Service, Inc. ("Sea-Land"), for its answer to the Amended Complaint herein, admits, denies and alleges as follows:

1. Denies each and every allegation contained in paragraph 1, except admits and alleges that plaintiff purports to bring this action pursuant to sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22 and 26.

2. Denies each and every allegation contained in paragraph 2, except admits and alleges that Sea-Land and R. J. Reynolds Tobacco Company ("Reynolds Tobacco") are qualified to do business in the State of California and are found within the Northern District of California.

3. Denies each and every allegation contained in paragraph 3, except admits that R. J. Reynolds Industries, Inc. ("Industries") owns one hundred percent of the stock of Reynolds Tobacco, McLean Industries, Inc. ("McLean"), Reynolds Leasing Corporation and RJR Foods, Inc. and that through subsidiaries it owns Sea-Land, American Independent Oil Company, R. J. Reynolds Tobacco International, S. A., Macdonald Tobacco Company, and R. J. Reynolds Tabacos do Brasil Ltda.

4. Denies each and every allegation contained in paragraph 4.

5. Denies each and every allegation contained in paragraph 5, except admits that defendant Industries is the sole stockholder of Sea-Land and that Sea-Land has compensated Industries for certain staff services performed by Industries in Winston-Salem, North Carolina.

6. Denies each and every allegation contained in paragraph 6, except admits that Sea-Land has, since 1970, reported to the Board of Directors of Industries as to overall financial and senior management matters involving Sea-Land's activities on a monthly, quarterly and year-end basis and that on occasion reports have been made on various subjects on a more frequent basis.

7. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 7.

8. Denies each and every allegation contained in paragraph 8, except admits that Industries annually prepares on the basis, in part, of information submitted to it by Sea-Land, a consolidated budget which includes the required or anticipated business expenditures in summary form submitted by all of its subsidiary companies, including Sea-Land, and which in small part necessarily includes business expenditures required or anticipated by Sea-Land for the conduct of its business in the Northern District of California.

9. Denies each and every allegation contained in paragraph 9.

10. Denies each and every allegation contained in paragraph 10.

11. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12, except admits that Industries has a financial interest as sole shareholder of the parent corporation of Sea-Land and of Reynolds Leasing Corporation in Sea-Land property, some of which may from time to time be located in or occasionally call at ports in the Northern District of California.

13. Denies each and every allegation contained in paragraph 13, except admits that Industries has from time to time since 1970 participated in the financing of the purchase of ships and other property of Sea-Land which from time to time may be located or occasionally call at ports in the Northern District of California.

14. Denies each and every allegation contained in paragraph 14, except admits that the business of Industries is to provide coordinated and centralized financial administrative, personnel, public relations and other services, and as sole shareholder it has the ultimate management responsibility, for its subsidiaries, including Sea-Land.

15. Denies each and every allegation contained in paragraph 15, except admits that since 1972, Industries has carried out the functions described above at paragraph 14 of this answer and that this work has involved occasional visits by officers and employees of Industries in the Northern District of California.

16. Denies each and every allegation contained in paragraph 16, except admits that Industries characterized its business operations in its 100th Anniversary Report to Shareholders in 1975 as set forth in the quoted material contained in paragraph 16 of the amended complaint.

17. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 17, except admits and alleges upon information and belief that Plaintiff Pacific Far East Line, Inc. ("PFEL") is a Delaware corporation with its principal place of business in San Francisco, California and is engaged in the operation of freight transportation by American flag vessels to the Far East and the Persian Gulf.

18. Denies each and every allegation contained in paragraph 18, except repeats and realleges paragraphs 3 through 16 of this answer.

19. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 19, except admits and alleges that defendant Reynolds Tobacco is a New Jersey corporation with its principal place of business in Winston-Salem, North Carolina.

20. Admits paragraph 20.

21. Denies each and every allegation contained in paragraph 21, except (a) admits and alleges that Sea-Land is a corporation organized under the laws of the State of Delaware and is a wholly-owned subsidiary of McLean, (b) is without knowledge or information sufficient to form a belief as to the truth of the allegation that Sea-Land operates the largest containerized freight transportation system in the world utilizing containers, containerships, chassis and related terminal equipment, (c) admits and alleges that Sea-Land operates in the domestic trade of

the United States and in foreign commerce, and (d) admits and alleges that in 1964 Sea-Land's revenues from its containership operation were $83,905,646 and that in 1975 Sea-Land's revenues from its containership operation were $759,423,098.

21(a). Admits the allegations of paragraph 21(a), except alleges that the correct name of said defendant is Reynolds Leasing Corporation.

22. Denies each and every allegation contained in paragraph 22.

23. Denies each and every allegation contained in paragraph 23, except (a) admits and alleges upon information and belief that PFEL engages in foreign commerce, and (b) admits and alleges that Sea-Land engages in interstate and foreign commerce.

24. Denies each and every allegation contained in paragraph 24, except admits that since 1965 Sea-Land has directly competed against PFEL on various routes.

25. Denies each and every allegation contained in paragraph 25.

26. Denies each and every allegation contained in paragraph 26.

27. Denies each and every allegation contained in paragraph 27.

28. Denies each and every allegation contained in paragraph 28, except admits and alleges that since 1966 there have been changes in world trade, the nature of port operations and the composition of the world's fleet of cargo ships.

29. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 29, except admits and alleges that American companies have been active in the movement toward containerized, LASH and Ro-Ro transportation systems.

30. Denies each and every allegation contained in paragraph 30.

31. Denies each and every allegation contained in paragraph 31, except admits and alleges that R. J. Reynolds Industries, Inc. has concluded, based on an investigation by its attorneys, that more than $19 million in possibly illegal rebates has been paid by Sea-Land to shippers, consignees and forwarding agents during the period 1971 through 1975, and with respect to the allegations of paragraphs 31(f) and (t); respectfully refers to court papers previously filed by defendants in this action.

32. Denies each and every allegation contained in paragraph 32.

33. Denies each and every allegation contained in paragraph 33.

34. Denies each and every allegation contained in paragraph 34.

FIRST AFFIRMATIVE DEFENSE

35. Plaintiff is barred from receiving relief from this Court by the doctrine of unclean hands.

SECOND AFFIRMATIVE DEFENSE

36. The claims asserted in the Complaint herein are barred in whole or in part by the applicable statute of

limitations, Section 4(b) of the Clayton Act, 15 U.S.C. § 15b.

THIRD AFFIRMATIVE DEFENSE

37. The claims asserted in the complaint herein are in whole or in part within the primary jurisdiction of the Federal Maritime Commission and are therefore not properly before this Court at this time.

FOURTH AFFIRMATIVE DEFENSE

38. Upon information and belief, PFEL, acting directly or through agents and others, has knowingly paid, authorized and aided and abetted the payment of rebates and other payments in contravention of PFEL's applicable conference agreements and PFEL's applicable tariffs to shippers, consignees, forwarding agents and other buyers of PFEL's services and to persons employed by shippers, consignees, forwarding agents and other buyers of PFEL's services. Upon information and belief, PFEL, acting directly or through agents or others, has also engaged in, authorized and aided and abetted other practices in contravention of PFEL's applicable conference agreements and tariffs. Upon information and belief, such payments and practices began before 1968 and are still continuing. Upon information and belief, such payments and practices have been made for the purpose and with the effect of disadvantaging competitors of PFEL, including Sea-Land. Upon information and belief, PFEL has knowingly failed to disclose, or has issued false denials of, the existence of such payments and practices to the Maritime Administration of the United States Department of Commerce in connection with PFEL's application for and receipt of

operating differential subsidy ("ODS") payments from the United States Government, as well as to the Federal Maritime Commission, the Securities and Exchange Commission, other agencies of the United States Government and the general public. Upon information and belief, such failure to disclose and such denials were done for the purpose and with the effect of receiving ODS payments and of disadvantaging competitors of PFEL, including Sea-Land.

39. In view of the facts alleged in paragraph 38, any acts of Sea-Land complained of herein were performed in self-defense against illegal and fraudulent acts of PFEL and others and were performed without any purpose or effect of restraining competition. Such acts of Sea-Land did not violate any of the United States antitrust laws.

COUNTERCLAIM

40. Sea-Land realleges each and every allegation contained in paragraph 38.

41. The acts of PFEL in failing to disclose, or in issuing false denials of, the existence of rebates and other payments and other practices alleged in paragraphs 38 and 40 above constitute violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as of other Federal statutes. The acts of PFEL alleged in paragraphs 38 and 40 above also constitute unlawful fraud and intentional infliction of business injury upon Sea-Land.

42. The unlawful acts of PFEL alleged in paragraphs 38 and 40 above injured and are continuing to injure Sea-Land in its business and property.

WHEREFORE, defendant Sea-Land Service, Inc. prays judgment against plaintiff Pacific Far East Line, Inc.:

1. Dismissing the amended complaint;

2. Adjudging and declaring that the acts of PFEL alleged in paragraphs 38 and 40 above constitute violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and enjoining and restraining PFEL and all persons acting in concert and participation with PFEL from engaging in any such acts;

3. Awarding Sea-Land treble the amount of its damages sustained by reason of the acts alleged in paragraphs 38 and 40 above, as required by Section 4 of the Clayton Act, 15 U.S.C. § 15;

4. Awarding Sea-Land its cost of litigation and reasonable attorneys' fees, as required by Section 4 of the Clayton Act, 15 U.S.C. § 15; and

5. Granting Sea-Land such other and further relief as may be just and proper.

Dated: January 7, 1977

Moses Lasky
Charles B. Cohler
Brobeck, Phleger & Harrison

Lawrence E. Walsh
Richard E. Nolan
Davis Polk & Wardwell

By RICHARD E. NOLAN
Attorneys for Defendant
Sea-Land Service, Inc.

Appendix H

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Attorneys for Plaintiff

United States District Court
Northern District of California

No. C-76-2312-AJZ

Pacific Far East Lines, Inc.,
Plaintiff,

vs.

R. J. Reynolds Industries, Inc.,
R. J. Reynolds Tobacco Company,
R. J. Reynolds Leasing Company,
Sea-Land Service Inc., and
McLean Industries, Inc.,
Defendants.

And Related Cross-Actions

[Filed Feb. 3, 1977]

REPLY TO COUNTERCLAIM OF
DEFENDANT SEA-LAND SERVICE, INC., AND
COUNTERCLAIM OF
PACIFIC FAR EAST LINES, INC.

(Jury Demanded)

Pacific Far East Lines, Inc. (hereinafter "PFEL") replies to the counterclaim of defendant Sea-Land Service, Inc. (hereinafter "SEA-LAND") dated January 7, 1977 admits, denies and alleges as follows:

1. Denies generally and specifically each and every allegation contained at Paragraph 40 of said counterclaim. PFEL further generally and specifically denies each and every of the allegations of Paragraph 38 of the answer of defendant SEA-LAND to the Amended Complaint on file herein to the extent that said allegations or any of them have been incorporated in or realleged at Paragraph 40 of the counterclaim herein.

2. PFEL denies generally and specifically each and every of the allegations contained at Paragraph 41 of the counterclaim herein.

3. PFEL denies the allegations contained at Paragraph 42 of the counterclaim herein and alleges specifically that SEA-LAND has not suffered and is not continuing to suffer any injury whatsoever to its business or property.

FIRST AFFIRMATIVE DEFENSE

4. The claims asserted in the counterclaim of SEA-LAND herein are barred in whole or in part by the applicable statute of limitations, Section 4(b) of the Clayton Act 15 U.S.C., Section 15(b).

SECOND AFFIRMATIVE DEFENSE

5. The claims asserted in the counterclaim of SEA-LAND herein are in whole or in part within the primary jurisdiction of the Federal Maritime Commission and are therefore not properly before this Court at this time.

THIRD AFFIRMATIVE DEFENSE

6. The counterclaim of SEA-LAND has failed to state a claim against PFEL upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

7. SEA-LAND is barred in whole or in part from receiving the relief sought in the counterclaim herein under the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

8. The claims asserted in the counterclaim of SEA-LAND herein are barred in whole or in part by the doctrine of *laches*.

SIXTH AFFIRMATIVE DEFENSE

9. SEA-LAND lacks standing to assert the claims alleged against PFEL herein.

SEVENTH AFFIRMATIVE DEFENSE

10. The counterclaim of SEA-LAND fails to comply with Rules 8(a) and 8(e) of the Federal Rules of Civil Procedure.

EIGHTH AFFIRMATIVE DEFENSE

11. The claims of SEA-LAND herein fail in whole or in part to state a claim against PFEL upon which relief can be granted because of the immunity of PFEL due to Government action.

COUNTERCLAIM OF PFEL

12. PFEL realleges and incorporates herein by reference each and every allegation contained in PFEL's First Amended Complaint for damages and injunctive relief under Federal antitrust laws, filed December 17, 1976.

13. The counterclaim of SEA-LAND was filed by SEA-LAND acting as agent for the other defendants herein and was brought in bad faith in furtherance of the violations alleged by PFEL in its First Amended Complaint herein and for the purpose and with the intent of eliminating competition and restraining trade in American flag ship freight transportation, and in particular to eliminate and restrain PFEL as a viable competitor in said freight transportation, all in violation and in furtherance of defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2 and Sections 2(c), 3 and 7 of the Clayton Act 15 U.S.C. Sections 13(c), 14 and 18.

14. The unlawful acts of SEA-LAND alleged in paragraphs 12 and 13 above injured and are continuing to injure PFEL and its business and property.

WHEREFORE, plaintiff PFEL prays judgment against defendant and counterclaimant SEA-LAND:

(1) Dismissing the counterclaim of SEA-LAND herein;

(2) Adjudging and declaring that defendants and each of them have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, Sections 2(c), 3 and 7 of the Clayton Act, 15 U.S.C. Sections 13(c), 14 and 18;

(3) That defendants and each of them be permanently enjoined from performing or carrying out each and every one of the unlawful acts, practices, contracts, combinations and conspiracies alleged in this counterclaim and PFEL's First Amended Complaint herein, including the plan to enter into a "monopolistic investment" in the Persian Gulf;

(4) That R. J. Reynolds Industries, Inc. be ordered to divest itself of all ownership and interest in McLean Industries, Inc. and SEA-LAND;

(5) That PFEL recover its damages trebled as required by Section 4 of the Clayton Act;

(6) That PFEL be awarded reasonable attorneys' fees and its costs of litigation and required by Section 4 of the Clayton Act; and

(7) That PFEL be granted such other and further relief as the Court may deem just and proper.

Dated: February 3, 1977.

Lawrence John Appel, a Member of
Law Offices of Joseph L. Alioto
Joseph M. Alioto
111 Sutter Street, Suite 2100
San Francisco, California 94104

By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel

Pursuant to Rule 38(b) Federal Rules of Civil Procedure, PFEL hereby makes demand for jury trial on all issues raised by the counterclaim of SEA-LAND, PFEL'S reply thereto and the counterclaim of PFEL.

By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel
One of the Attorneys for PFEL

CERTIFICATE OF SERVICE BY MAIL

Geraldine S. Beck certifies that her business address is 111 Sutter Street, San Francisco, California 94104; and that she is a resident of the State of California.

That on the date hereof she served a copy of:

Reply to Counterclaim of Defendant SEA-LAND SERVICE, INC. and Counterclaim of PACIFIC FAR EAST LINES, INC.

on each of the following, by placing one copy of each of said documents in an envelope addressed, respectively as follows:

Moses Lasky
Charles B. Cohler
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104

Lawrence E. Walsh
Richard E. Nolan
Davis Polk & Wardwell
One Chase Manhattan Plaza

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States mail at San Francisco, California.

Dated: February 3, 1977

/s/ GERALDINE S. BECK
Geraldine S. Beck

Appendix I

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Telephone: (415) 434-2100
Attorneys for Plaintiff

United States District Court
Northern District of California

No. C-77-0582-CBR

States Steamship Company,
Plaintiff,
vs.
Sea-Land Service, Inc. and
R. J. Reynolds Tobacco Company,
Defendants.

[Filed Mar. 21, 1977]

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER FEDERAL ANTITRUST LAWS

(Jury Demanded)

Plaintiff States Steamship Company (hereinafter "States"), demanding trial by jury, complains and alleges as follows:

I

JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the named defendants under Sections

4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15, 22 and 26) to secure damages for and injunctive relief against the violations by the named defendants of Section 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) and Sections 2(c), 3 and 7 of the Clayton Act (15 U.S.C. §§ 13(c), 14 and 18).

2. Defendants, and each of them, transact business, maintain an office, have agents and employees, and are found within the Northern District of California. Defendants, and each of them, are within the jurisdiction of this Court for the purpose of service of process. The interstate trade and commerce hereinafter described is in part carried on, and the acts done in violation of the antitrust laws hereinafter alleged, were performed, in part, within the Northern District of California.

II
THE PARTIES

3. States Steamship Company is a Nevada corporation with its principal place of business in San Francisco, California. States is an ocean freight carrier and is engaged in the business of transporting freight by American Flag Vessel in the United States and foreign commerce.

4. Sea-Land Service, Inc. ("Sea-Land") is a Delaware corporation and maintains a major business office in Oakland, California. Sea-Land is an ocean freight carrier and is engaged in the business of transporting freight by American Flag Vessels in the United States and foreign commerce.

5. Sea-Land operates the largest containerized freight transportation system in the world utilizing containers, container ships, chassis, and related terminal equipment. Sea-Land operates 31.6% of all container ships in foreign commerce and 55% of all container ships operating in foreign commerce under the flag of the United States.

6. R. J. Reynolds Tobacco Company ("Tobacco") is a New Jersey corporation with its principal place of business in Winston-Salem, North Carolina and is the largest manufacturer of tobacco products in the United States. Through a series of acquisitions and mergers beginning about 1963, Tobacco has expanded its activities into areas other than tobacco. At least one of these acquisitions was the subject of an action brought by the United States under Section 7 of the Clayton Act as a result of which, on or about September, 1969, Tobacco was ordered to divest. In one of its largest acquisitions, Tobacco, in May, 1969, acquired the business and assets of the predecessor of McLean Industries, Inc.

III
CO-CONSPIRATORS

7. Certain corporations, persons or entities participated in and made statements and performed acts in furtherance of the violations of the antitrust laws alleged in this Complaint, including without limitation, R. J. Reynolds Industries, Inc., Reynolds Leasing Corporation, Aminoil International, Inc., American Independent Oil Company, Aminoil U.S.A., Inc. and McLean Industries, Inc.

8. R. J. Reynolds Industries, Inc. ("Industries") owns and controls one hundred percent (100%) of the stock of Tobacco, Sea-Land, McLean Industries, Inc., Reynolds Leasing Corporation, American Independent Oil Company, Aminoil International, Inc. and Aminoil U.S.A., Inc.

9. McLean Industries, Inc. is a Delaware corporation and a wholly-owned subsidiary of Industries and is the successor to the assets and the business of a corporation of the same name that was acquired by Tobacco in May, 1969. McLean Industries, Inc. is and was a holding company operating through a number of wholly-owned subsidiaries, the principal one of which, Sea-Land, accounted for most of the revenues of McLean's predecessor.

10. Reynolds Leasing Corporation is a wholly-owned subidiary corporation of Industries and leases ships and containers to Sea-Land.

IV

TRADE AND COMMERCE

11. The trade and commerce involved herein are the transportation of freight by common carriers by water in United States and foreign commerce.

12. A common carrier by water engages in water-borne transportation of passengers or property, and makes its services available to the general public at published tariffs on a first-come, first-served basis, operating regularly scheduled sailings on designated trade routes. A common carrier by water is to be distinguished from what is commonly called an ocean tramp, which engages in contracted water-borne transportation services for specific customers at negotiated rates. A common carrier by water in foreign commerce makes its regularly scheduled sailings on designated trade routes between United States ports and ports in foreign countries or in territories or possessions of the United States.

13. All military cargoes shipped by the Department of Defense or related agencies to foreign countries must be carried in vessels operating under the United States flag.

14. States and Sea-Land are and at all times relevant herein were, engaged in interstate and foreign commerce in the operation of their freight vessels throughout the world. Sea-Land and States have been in direct competition with each other on various routes since 1968 in the above-described trade and commerce.

V

OFFENSES CHARGED

15. Defendants and each of them have, since 1964 and continuing to the date of this Complaint, performed acts and contracted, combined and conspired between and among themselves and with others to unreasonably restrain the trade and commerce hereinabove described and have contracted, combined and conspired between and among themselves and with others to monopolize and have attempted to monopolize and monopolized the trade and commerce hereinabove described, all in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and

Sections 2(c), 3 and 7 of the Clayton Act (15 U.S.C. §§ 13(c), 14 and 18).

16. The acts, contracts, combinations, conspiracies and violations alleged at Paragraph 15 above have consisted, in part, of the following acts, practices and courses of conduct, all performed and undertaken by defendants, and each of them, with the express and predatory purpose and intent of eliminating the actual and potential competition of plaintiff and injuring plaintiff in its business and property:

(a) During a period beginning August 30, 1972, and continuing through April 1, 1976, Sea-Land, either alone or in conjunction with other persons, directly or indirectly, allowed shippers and consignees or their agents in the United States trades with Europe, the Mediterranean, the Caribbean, and the Far East, to obtain transportation for property at less than the regular rates or charges then established and enforced by Sea-Land, by the use of unjust or unfair devices or means, resulting in 540 or more violations of Section 16, Secon, of the Act (46 U.S.C. Section 815);

(b) On a continuing daily basis throughout the period from August 30, 1972, until April 1, 1976, Sea-Land engaged in rebating, refunding or remitting portions of the rates and charges in effect and specified in its tariffs on file with the Federal Maritime Commission, to shippers and consignees, or their agents, which resulted in 1,300 or more violations of Section 18(b)(3) of the Act (46 U.S.C. Section 817);

(c) Unlawfully paying nineteen million dollars ($19,000,000.00) in rebates to shippers, consignees and forwarding agents during the period 1971 through 1975;

(d) Unlawfully paying more than twenty million dollars ($20,000,000.00) in excess commissions to shipping agents, buyers, and agents of buyers during the period 1971 through 1975 and failing to disclose the fact of said payments;

(e) Leasing and selling goods, equipment, supplies and other commodities, including shipping containers, and fixing the price charged therefor on the condition that the lessees and purchasers of said goods, supplies and other commodities not use or deal in the goods, equipment, supplies and commodities of competitors of defendants, including plaintiff and on the further condition that said goods, supplies and other commodities not be sold to or used by competitors of defendants, including plaintiff;

(f) Agreeing to operate and operating Reynolds Leasing Corporation, Sea-Land and other subsidiaries of Industries below cost;

(g) Arranging and following intercompany accounting procedures for the purpose or concealing the fact of below-cost operation by Sea-Land and other subsidiaries of Industries;

(h) Subsidizing Sea-Land's below-cost predatory tactics from the huge interstate and foreign treasuries of Industries supplemented in turn by United States Government subsidies, direct and indirect, to Industries;

(i) Threatening to engage and actually engaging in litigations, interferences and protests in courts and before government bureaus and agencies against American-flag operators for anti-competitive purposes and for the intended purpose of causing unnecessary litigation expenses and delays in the granting of governmental rights and licenses to American-flag competitors;

(j) Paying unlawful bribes and political contributions in the United States and elsewhere in an effort to increase monies and profits available to defendants for purposes of competing against plaintiff and to unlawfully affect shipping regulations, tariffs and laws and to secure preferential berthing rights;

(k) Agreed to deal reciprocally between and among themselves to the intended detriment of plaintiff;

(l) Threatening to adopt and adopting rebate policies to lower the revenues of American-flag competitors;

(m) Attempting to acquire competitive ocean freight carriers for the purpose of restraining and monopolizing trade;

(n) Over-tonnage trade for the purpose of driving American-flag competitors to bankruptcy;

(o) Utilizing steamship conferences for the purpose of acting in concert against competitors, including plaintiff;

(p) Engaging in predatory acts of commercial espionage, interference and pricing against American-flag competitors;

(q) Acquiring substantial interests in the oil industry for the purpose of gaining competitive leverage over American-flag competitors;

(r) Attempting to defeat and forestall plaintiff's efforts to introduce RO-RO as a competitive shipping service and opposing all attempts to make RO-RO competitive with containerized shipping services;

(s) Maintaining off-book slush funds of cash from which they intended to pay and did pay commercial bribes and other illegal rebates;

(t) Providing fuel to Sea-Land at cost or below cost.

17. Plaintiff had no knowledge of the unlawfulness of the acts hereinabove alleged, or of any facts which might reasonably have led to the discovery thereof until September, 1976. Plaintiff could not have discovered the unlawful acts at an earlier date by the exercise of due diligence because of the secretive and deceptive techniques employed by defendants to avoid detection.

VI

EFFECT OF VIOLATIONS

18. As a direct and proximate result of the foregoing acts, contracts, combinations and conspiracies, plaintiff has

suffered substantial monetary damage to its business and property in an amount not as yet ascertained. When the amounts of said damages are ascertained, they will be inserted into this Complaint.

19. As a direct and proximate result of the foregoing acts, contracts, combinations and conspiracies, competition in and for the interstate and foreign trade and commerce described herein has been substantially diminished and potential competition unlawfully reduced.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants and each of them violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2) and Sections 2(c), 3 and 7 of the Clayton Act;

2. That defendants and each of them be permanently enjoined from performing or carrying out each and every one of the unlawful acts, practices, contracts, combinations and conspiracies alleged in this Complaint;

3. That Industries be ordered to divest itself of all ownership interest in McLean and Sea-Land;

4. That plaintiff recover its damages, trebled as required by Section 4 of the Clayton Act;

5. That plaintiff be awarded reasonable attorneys' fees and its costs of litigation as required by Section 4 of the Clayton Act; and

6. That plaintiff be granted such other and further relief as the Court may deem just and proper.

Dated: March 21, 1977.

Alioto & Alioto
Joseph M. Alioto
Lawrence John Appel

By LAWRENCE JOHN APPEL

Lawrence John Appel
One of the Attorneys for Plaintiff

Pursuant to Rule 38(b), Fed.R.Civ.P., plaintiff hereby makes demand for jury trial.

By LAWRENCE JOHN APPEL

Lawrence John Appel
One of the Attorneys for Plaintiff

Appendix J

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Attorneys for Defendant
Sea-Land Service, Inc.

In the United States District Court
For the Northern District of California

No. C 77 0582 CBR

States Steamship Company,
Plaintiff,
vs.
Sea-Land Service, Inc. and
R. J. Reynolds Tobacco Company,
Defendants.

ANSWER TO COMPLAINT AND COUNTERCLAIM OF DEFENDANT SEA-LAND SERVICE, INC.

Defendant Sea-Land Service, Inc. ("Sea-Land"), for its answer to the Complaint herein, admits, denies and alleges as follows:

1. Denies each and every allegation contained in paragraph 1, except admits and alleges that plaintiff purports to bring this action pursuant to sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22 and 26.

2. Denies each and every allegation contained in paragraph 2, except admits and alleges that Sea-Land and R. J. Reynolds Tobacco Company ("Reynolds Tobacco") are qualified to do business in the State of California and are found within the Northern District of California.

3. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 3, except admits and alleges upon information and belief that plaintiff States Steamship Company ("States") is a Nevada corporation with its principal place of business in San Francisco, California and is engaged in the operation of freight transportation by American flag vessels in the United States and foreign commerce.

4. Denies each and every allegation contained in paragraph 4, except (a) admits and alleges that Sea-Land is a corporation organized under the laws of the State of Delaware, (b) admits and alleges that Sea-Land maintains a business office in Oakland, California, and (c) admits and alleges that Sea-Land operates in the domestic trade of the United States and in foreign commerce.

5. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 5.

6. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 6, except admits and alleges that defendant Reynolds Tobacco is a New Jersey corporation with its principal place of business in Winston-Salem, North Carolina.

7. Denies each and every allegation contained in paragraph 7.

8. Denies each and every allegation contained in paragraph 8, except admits that R. J. Reynolds Industries, Inc. owns one hundred percent of the stock of Reynolds Tobacco, McLean Industries, Inc., Aminoil International, Inc., and Reynolds Leasing Corporation and that through subsidiaries it owns Sea-Land, American Independent Oil Company and Aminoil U.S.A. Inc.

9. Admits the allegations of paragraph 9.

10. Admits the allegations of paragraph 10.

11. Is without knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraph 11.

12. Denies each and every allegation contained in paragraph 12.

13. Denies each and every allegation contained in paragraph 13.

14. Denies each and every allegation contained in paragraph 14, except (a) admits and alleges upon information and belief that States engages in foreign commerce and

(b) admits and alleges that Sea-Land engages in interstate and foreign commerce.

15. Denies each and every allegation contained in paragraph 15.

16. Denies each and every allegation contained in paragraph 16, except admits and alleges that R. J. Reynolds Industries, Inc. has concluded, based on an investigation by its attorneys, that more than $19 million in possibly illegal rebates has been paid by Sea-Land to shippers, consignees and forwarding agents during the period 1971 through 1975.

17. Denies each and every allegation contained in paragraph 17.

18. Denies each and every allegation contained in paragraph 18.

19. Denies each and every allegation contained in paragraph 19.

FIRST AFFIRMATIVE DEFENSE

20. Plaintiff is barred from receiving relief from this Court by the doctrine of unclean hands.

SECOND AFFIRMATIVE DEFENSE

21. The claims asserted in the Complaint herein are barred in whole or in part by the applicable statute of limitations, Section 4B of the Clayton Act, 15 U.S.C. § 15b.

THIRD AFFIRMATIVE DEFENSE

22. The claims asserted in the Complaint herein are in whole or in part within the primary jurisdiction of the

Federal Maritime Commission and are therefore not properly before this Court at this time.

FOURTH AFFIRMATIVE DEFENSE

23. Upon information and belief, States, acting directly or through agents and others, has knowingly paid, authorized and aided and abetted the payment of rebates and other payments in contravention of States' applicable conference agreements and States' applicable tariffs to shippers, consignees, forwarding agents and other buyers of States' services and to persons employed by shippers, consignees, forwarding agents and other buyers of States' services. Upon information and belief, States, acting directly or through agents or others, has also engaged in, authorized and aided and abetted other practices in contravention of States' applicable conference agreements and tariffs. Upon information and belief, such payments and practices began before 1971 and are still continuing. Upon information and belief, such payments and practices have been made for the purpose and with the effect of disadvantaging competitors of States, including Sea-Land. Upon information and belief, States has knowingly failed to disclose the existence of such payments and practices to the Maritime Administration of the United States Department of Commerce in connection with States' application for and receipt of operating differential subsidy ("ODS") payments from the United States Government, as well as to the Federal Maritime Commission and other agencies of the United States Government and the general public. Upon information and belief, such failure to disclose and such denials were done for the purpose and with

the effect of receiving ODS payments and of disadvantaging competitors of States, including Sea-Land.

24. In view of the facts alleged in paragraph 23, any acts of Sea-Land complained of herein were performed in self-defense against illegal and fraudulent acts of States and other and were performed without any purpose or effect of restraining competition. Such acts of Sea-Land did not violate any of the United States antitrust laws.

COUNTERCLAIM

25. Sea-Land realleges each and every allegation contained in paragraph 23.

26. The acts of States in failing to disclose, or in issuing false denials of, the existence of rebates and other payments and other practices alleged in paragraphs 23 and 25 above constitute violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, as well as of other Federal statutes. The acts of States alleged in paragraphs 23 and 25 above also constitute unlawful fraud and intentional infliction of business injury upon Sea-Land.

27. The unlawful acts of States alleged in paragraphs 23 and 25 above injured and are continuing to injure Sea-Land in its business and property.

WHEREFORE, defendant Sea-Land Service, Inc. prays judgment against plaintiff States Steamship Company:

1. Dismissing the complaint;

2. Adjudging and declaring that the acts of States alleged in paragraphs 23 and 25 above constitute violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C.

§§ 1 and 2, and enjoining and restraining States and all persons acting in concert and participation with States from engaging in any such acts;

3. Awarding Sea-Land treble the amount of its damages sustained by reason of the acts alleged in paragraphs 23 and 25 above, as required by Section 4 of the Clayton Act, 15 U.S.C. § 15;

4. Awarding Sea-Land its cost of litigation and reasonable attorneys' fees, as required by Section 4 of the Clayton Act, 15 U.S.C. § 15; and

5. Granting Sea-Land such other and further relief as may be just and proper.

Dated: June 22, 1977

Moses Lasky
Charles B. Cohler
Brobeck, Phleger & Harrison

Lawrence E. Walsh
Richard E. Nolan
Davis Polk & Wardwell

By /s/ LAWRENCE E. WALSH

Attorneys for Defendant
Sea-Land Service, Inc.

Appendix K

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Telephone: (415) 434-2100
Attorneys for Plaintiff

United States District Court
Northern District of California

No. C-77-0582-AJZ

States Steamship Company,
Plaintiff,

vs.

Sea-Land Service, Inc. and
R. J. Reynolds Tobacco Company,
Defendants.

And Related Cross-Actions

[Filed July 12, 1977]

REPLY TO COUNTERCLAIM OF DEFENDANT SEA-LAND SERVICE, INC. AND COUNTERCLAIM OF STATES STEAMSHIP COMPANY
(Jury Demanded)

States Steamship Company replies to the counterclaim of defendant Sea-Land Service, Inc. dated June 22, 1977 and admits, denies and alleges as follows:

1. Denies generally and specifically each and every allegation contained at Paragraph 25 of said counterclaim.

States further generally and specifically denies each and every of the allegations of Paragraph 23 of the answer of defendant Sea-Land to the Complaint on file herein to the extent that said allegations or any of them have been incorporated in or realleged at Paragraph 25 of the counterclaim herein.

2. States denies generally and specifically each and every of the allegations contained at Paragraph 26 of the counterclaim herein.

3. States denies the allegations contained in Paragraph 27 of the counterclaim herein and alleges specifically that Sea-Land has not suffered and is not continuing to suffer any injury whatsoever to its business or property.

FIRST AFFIRMATIVE DEFENSE

4. The claims asserted in the counterclaim of Sea-Land herein are barred in whole or in part by the applicable statute of limitations, Section 4(b) of the Clayton Act 15 U.S.C., Section 15(b).

SECOND AFFIRMATIVE DEFENSE

5. The claims asserted in the counterclaim of Sea-Land herein are in whole or in part within the primary jurisdiction of the Federal Maritime Commission and are therefore not properly before this Court at this time.

THIRD AFFIRMATIVE DEFENSE

6. The counterclaim of Sea-Land has failed to state a claim against States upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

7. Sea-Land is barred in whole or in part from receiving the relief sought in the counterclaim herein under the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

8. The claims asserted in the counterclaim of Sea-Land herein are barred in whole or in part by the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE

9. Sea-Land lacks standing to assert the claims alleged against States herein.

SEVENTH AFFIRMATIVE DEFENSE

10. The counterclaim of Sea-Land fails to comply with Rules 8(a) and 8(e) of the Federal Rules of Civil Procedure.

EIGHTH AFFIRMATIVE DEFENSE

11. The claims of Sea-Land herein fail in whole or in part to state a claim against States upon which relief can be granted because of the immunity of States due to Government action.

COUNTERCLAIM OF STATES STEAMSHIP COMPANY

12. States realleges and incorporates herein by reference each and every allegation contained in States' Complaint for damages and injunctive relief under the Federal antitrust laws, filed March 21, 1977.

13. The counterclaim of Sea-Land was filed by Sea-Land acting as agent for the other defendant herein and was brought in bad faith in furtherance of the violations alleged by States' Complaint herein and for the purpose and with the intent of eliminating competition and restraining trade in American flag ship freight transportation, and in particular to eliminate and restrain States as a viable competitor in said freight transportation, all in violation and in furtherance of defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2 and Sections 2(c), 3 and 7 of the Clayton Act 15 U.S.C. Sections 13(c), 14 and 18.

14. The unlawful acts of Sea-Land alleged in Paragraphs 12 and 13 above injured and are continuing to injure States in its business and property.

WHEREFORE, plaintiff States prays judgment against defendant and counterclaimant Sea-Land:

(1) Dismissing the counterclaim of Sea-Land herein;

(2) Adjudging and declaring that defendants and each of them have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1 and 2, Sections 2(c), 3 and 7 of the Clayton Act, 15 U.S.C. Sections 13(c), 14 and 18;

(3) That defendants and each of them be permanently enjoined from performing or carrying out each and every one of the unlawful acts, practices, contracts, combinations and conspiracies alleged in this counterclaim and States' Complaint herein;

(4) That States recover its damages trebled as required by Section 4 of the Clayton Act;

(5) That States be awarded reasonable attorneys' fees and its costs of litigation as required by Section 4 of the Clayton Act; and

(6) That States be granted such other and further relief as the Court may deem just and proper.

Dated: June 12, 1977.

Alioto and Alioto
Joseph M. Alioto
Lawrence John Alioto
111 Sutter Street, Suite 2100
San Francisco, CA 94104

By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel

Pursuant to Rule 38(b) Federal Rules of Civil Procedure, States hereby makes demand for jury trial on all issues raised by the counterclaim of Sea-Land, States' reply thereto and the counterclaim of States.

By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel
One of the attorneys for Plaintiff

CERTIFICATE OF SERVICE BY MAIL

Phllis Winters certifies that her business address is 111 Sutter Street, San Francisco, California 94104; and that she is a resident of the State of California.

That on the date hereof she served a copy of:

Reply to Counterclaim of Defendant SEA-LAND SERVICE, INC. and Counterclaim of STATES STEAMSHIP COMPANY on each of the following, by placing one copy of each of said documents in an envelope addressed, respectively as follows:

Moses Lasky
Charles B. Cohler
Brobeck, Phleger & Harrison
111 Sutter Street
San Francisco, California 94104

Lawrence E. Walsh
Richard E. Nolan
Davis Polk & Wardwell
One Chase Manhattan Plaza
New York, New York

That said envelope was then sealed and postage fully prepaid thereon and on said date was deposited in the United States mail at San Francisco, California.

Dated: June 12, 1977.

/s/ PHILLIS WINTER
Phillis Winter

Appendix L

United States District Court
for the Northern District of California

Pacific Far East Line, Inc., Plaintiff, vs. R.J. Reynolds Industries, Inc., et al., Defendants.	No. C-76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc. and R.J. Reynolds Tobacco Company, Defendants.	No. C-77-0582 AJZ

[Filed November 16, 1978]

ORDER APPOINTING SPECIAL MASTER

IT IS HEREBY ORDERED that Douglas R. Young, Esq. is appointed as special master for the purpose of conducting an inspection of those documents known as the "Far East documents," which were produced to defendants by agents and former agents of plaintiffs in the Far East. For said purpose, Mr. Young shall be compensated by defendants.

Dated: November 16, 1978

/s/ Alfonso J. Zirpoli
United States District Judge

Appendix M

Douglas R. Young
Attorney at Law
235 Montgomery Street
San Francisco, California 94104
Telephone: (415) 981-3722

United States District Court
Northern District of California

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and McLean Industries, Inc., Defendants.	No. C 76 2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc. and R. J. Reynolds Tobacco Company, Defendants.	No. C 77 0582 AJZ

[Filed Nov. 22, 1978]

REPORT OF SPECIAL MASTER

I

INTRODUCTION

Plaintiffs have brought actions alleging certain violations of United States antitrust laws, including allegations that defendants have engaged in rebating. Defendants have made certain counterclaims, including allegations that plaintiffs' former agents in the Far East have themselves engaged in rebating.

In July 1978, counsel for the parties and a court-appointed auditor traveled to the Far East for discovery. In the course of this exercise, various documents were obtained from plaintiffs' agents and former agents.

Subsequently, defendants moved for dismissal of plaintiffs' complaints and for sanctions, on the grounds that plaintiffs falsely represented that they did not engage in rebating and that plaintiffs obstructed the discovery process. Plaintiffs moved for dismissal of the counterclaim asserted by defendant Sea-Land Service, Inc. (and for sanctions) on the ground that defendants had themselves obstructed the discovery process.

Defendants intend to use some of the documents obtained during the above-described trip to the Far East to prosecute their motion. Plaintiffs no longer have access to the documents produced in the Far East, and have sought to have such documents produced. Defendants claim to have already produced those documents upon which they intend to rely at the hearings regarding the motions described above, and therefore oppose the document production sought by plaintiffs.

The Court has appointed a special master to examine those documents obtained by defendants in the Far East and not yet produced to plaintiffs, and has instructed said individual (the undersigned) to determine whether any documents relevant to the obstruction and misrepresentation allegations now pending are among those documents not yet produced to plaintiffs. Relevant documents would include the following: (1) Documents tending to demonstrate that rebating was done only at lower levels; (2) documents tending to show that management and counsel were unaware that rebating was occurring; (3) documents that would rebut the fact of rebating; or (4) documents that would substantiate a good faith belief that no rebating was occurring.

II

REPORT

Although few of the documents reviewed fall directly into the categories listed above, several documents (listed by code number below) may prove relevant. (Of course, the significance of the documents identified below is a matter left to the arguments of counsel and to the judgment of the Court.)

The following should be noted: First, the undersigned does not read Japanese and, therefore (with a few exceptions), none of the documents written in Japanese has been identified for possible disclosure. Second, many of the documents identified below appeared several times among the documents reviewed, but only one copy of each document has been identified. Third, for the convenience of the Court, the documents identified for possible disclosure have been photocopied by the undersigned and attached to the

copy of this Report submitted to the Court.[1] Finally, an original and six copies of this Report have been submitted to the Court, so that the Court may, in its discretion, file the Report and disclose it to counsel.

The documents identified for possible disclosure to plaintiffs are the following:

S900266	S902942-43
S900341, and 44	S902997-3001
S900348-49	S903079
S900610	S903104
S900611	S903131-32
S900653	S903152
S900656	S903357
S900659-60	S903365
S900668	S903445
S900671-73	S903506
S900731	S903561-62
S900741-44	S903572
S900754	S903582
S900755	S903687
S900906	S903691
S901156	S903796
S901276	S903799-800
S901347	S903842
S901348	S903954-55
S901370	S903976
S901654	S903983
S901851-52	P900436
S902621, and 25	P900598-600

[1]Due to the sensitive nature of this material, and the fact that it has been submitted to the Court under seal, the photocopying of documents was accomplished by the undersigned personally. At no time has any document been in the possession of any person other than the undersigned.

III

TIME AND COSTS

The time spent in reviewing the documents in preparing this report was four (4) days. The cost of xeroxing the documents listed above for submittal to the Court was $10.05.

Dated: November 20, 1978.

Respectfully submitted,

Douglas R. Young

Douglas R. Young

Appendix N

United States District Court
for the Northern District of California

Pacific Far East Line, Inc., Plaintiff, vs. R.J. Reynolds Industries, Inc., et al., Defendants.	No. C-76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc. and R. J. Reynolds Tobacco Company, Defendants.	No. C-77-0582 AJZ

[Filed Dec. 4, 1978]

ORDER REGARDING CERTAIN MATTERS REFERRED TO SPECIAL MASTER

By order of November 16, 1978, the court appointed Douglas R. Young, Esq., special master for the purpose of inspecting certain documents submitted by the defendants for an in camera inspection, such documents being those commonly referred to by the parties as the "Far East" documents. Mr. Young has submitted his report to the court, and the court has reviewed the report and the recommendations contained therein. Good cause appearing therefor,

IT IS HEREBY ORDERED that the report of the special master shall be filed in these cases.

IT IS FURTHER ORDERED that the report and the recommendations contained therein are accepted, and the defendants shall produce documents accordingly.

IT IS FURTHER ORDERED that defendants shall pay to Douglas R. Young the sum of $1,290.05, consisting of $1,280.00 for his services and $10.05 for photocopying.

Dated: December 4, 1978

/s/ Alfonso J. Zirpoli

United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1723

STATES STEAMSHIP COMPANY and
PACIFIC FAR EAST LINE, INC.,

Petitioners,

v.

THE HONORABLE ALFONSO J. ZIRPOLI, SENIOR DISTRICT JUDGE,
(R. J. REYNOLDS TOBACCO COMPANY and SEA-LAND
SERVICE, INC., Real Parties in Interest),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1723

STATES STEAMSHIP COMPANY and PACIFIC FAR EAST LINE, INC.,

Petitioners,

v.

THE HONORABLE ALFONSO J. ZIRPOLI, SENIOR DISTRICT JUDGE, (R. J. REYNOLDS TOBACCO COMPANY and SEA-LAND SERVICE, INC., Real Parties in Interest),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

Petitioners' petition for certiorari completely misstates the question presented by this case. Petitioners allege that the District Court has ordered a separate trial pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, and claim that the question presented is whether such a separate trial may be held without a jury when one of the parties has made a jury demand (Pet. 3, 10-11). In fact, the District Court has not ordered a separate trial pursuant to

Rule 42(b).* What the District Court has in fact done is to order an evidentiary hearing on a motion for sanctions, pursuant to Rule 37(b) and other rules of the Federal Rules of Civil Procedure, for willful failure to obey discovery orders of the District Court and for willful misrepresentation of material facts (Pet. A-1-A-5). Petitioners' contention that the holding of such a hearing on a motion for sanctions violates their right to a jury trial is supported by neither principle nor authority, and the Court of Appeals rightly denied petitioners' petition for a writ of mandamus.

Statutes Involved

The Seventh Amendment to the Constitution of the United States and Rule 38(a) of the Federal Rules of Civil Procedure are set forth in petitioners' petition for certiorari (Pet. 2-3). Rule 42(b) of the Federal Rules of Civil Procedure, which is also set forth in the petition for certiorari (Pet. 3), is not involved in this case.

Rule 37(b) of the Federal Rules of Civil Procedure reads in pertinent part as follows:

> "(b) *Failure to Comply with Order.*
>
> . . . .
>
> (2) *Sanctions by Court in Which Action is Pending.* If a party or an officer, director, or managing agent of a party or person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> (E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

* Indeed, until the filing of their petition for certiorari, petitioners made no claim that the District Court had ordered a separate trial pursuant to Rule 42(b). No such claim was made in petitioners' petition for mandamus in the Court of Appeals or in their arguments in the District Court.

Questions Presented

1. Will the holding of an evidentiary hearing on a motion for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, based upon willful failure to obey discovery orders of the District Court and willful misrepresentation of material facts, violate the right to a jury trial under the Seventh Amendment to the United States Constitution?

2. Did the Court of Appeals abuse its discretion by declining to issue a writ of mandamus to restrain the District Court from holding such an evidentiary hearing?

Statement of the Case

1. The Nature of the Present Actions

The petition herein arises out of two private antitrust actions which are pending before the Honorable Alfonso J. Zirpoli, U.S.D.J., in the United States District Court for the Northern District of California, and which have been consolidated for pretrial purposes. Petitioners Pacific Far East Line, Inc. ("PFEL") and States Steamship Company ("States"), the plaintiffs in these actions, claimed among other things that respondent Sea-Land Service, Inc. ("Sea-Land"), a subsidiary of R. J. Reynolds Industries, Inc., violated the United States antitrust laws by paying rebates.* Sea-Land admitted the past payment of rebates, but denied any antitrust violations. By way of affirmative defense and

* Common carriers by water in the foreign commerce of the United States are required by the Shipping Act of 1916 to file tariffs with the Federal Maritime Commission setting forth their rates for the carriage of goods in the foreign commerce of the United States. 46 U.S.C. § 817(b)(1). The payment of rebates to customers with respect to tariffs so filed is prohibited, subject to civil penalties, by the Shipping Act. 46 U.S.C. §§ 815 (Second), 817(b)(3).

counterclaim, it alleged that petitioners or their agents had paid rebates.

2. Petitioners' Denials of Their Rebating in These Actions

From the outset of these actions, beginning even before their first reply to Sea-Land's counterclaims, both petitioners have consistently denied the payment of rebates. The following chronology sets forth petitioners' principal denials of rebating:

October 15, 1976	PFEL commenced its action.
November 29, 1976	PFEL was deposed by its President. He testified that PFEL had not paid rebates (John I. Alioto Dep., Nov. 29, 1976, pp. 67-70, 76-77; *see* Pet. A-2).
December 23, 1976	PFEL replied to Sea-Land's counterclaim and specifically denied that it had paid or was paying rebates, directly or through its agents (Pet. A-2, F-2).
February 3, 1977	PFEL replied to Sea-Land's counterclaim in response to PFEL's amended complaint, again denying the payment of rebates (Pet. A-3, H-2).
February 28, 1977	Petitioners' attorney responded to the District Court's question as to PFEL's rebating by stating that "our knowledge so far is that it's not so" (Feb. 28, 1977 Tr. 16; *see* Pet. A-3).
March 21, 1977	States commenced its action.

July 1, 1977 — In response to a question by the District Court concerning whether PFEL would produce its rebate documents, petitioners' attorney stated that PFEL had denied rebating (July 1, 1977 Tr. 20; *see* Pet. A-3).

July 12, 1977 — States replied to Sea-Land's counterclaim, and denied that it had paid or was paying rebates, directly or indirectly (Pet. A-3, K-1-K-2).

January 16, 1978 — Petitioners answered respondents' interrogatories. PFEL stated that the only payments made by PFEL or anyone else to its cotton customers from October 15, 1972 to October 15, 1976 were payments for cargo claims and adjustments, and States alleged that the only payments made by States or anyone else to its cotton customers from March 21, 1973 to March 21, 1977 were for claims for loss or damage to cotton shipments (*see* Pet. A-3).

January 23, 1978 — Respondents commenced compliance depositions of petitioners. The second witness tendered by States testified that the only documents identifying persons who had paid monies to customers of States were documents relating to cargo claims and correction notices (Kreuger Dep., Jan. 23, 1978, pp. 5-6; *see* Pet. A-3).

February 13, 1978 — In response to respondents' first motion for sanctions, petitioners filed

affidavits averring that it would have been pointless for petitioners to search their sales files for rebating documents because they knew there were no such documents in their sales files (Genovese Aff., Feb. 13, 1978, Ex. A, pp. 8-9, Ex. B, pp. 6-7; Coghlan Aff., Feb. 13, 1978, p. 2; *see* Pet. A-4).

December 13, 1978 — Petitioners' attorney admitted to the District Court that PFEL had paid rebates until the end of 1977 (Dec. 13, 1978 Tr. 68). He asserted that PFEL did not pay rebates before October 15, 1976, although he admitted that an agent of PFEL did pay rebates before October 15, 1976 (Dec. 13, 1978 Tr. 22).

3. Petitioners' Failure to Obey the Discovery Orders of the District Court

Petitioners have failed to obey repeated orders of the District Court to produce documents relating to rebating:

July 11, 1977 — Respondents served interrogatories and document requests upon PFEL, seeking, among other things, all documents of PFEL and its agents relating to rebating by any person to PFEL's customers for the period from October 15, 1972 to October 15, 1976.

July 21, 1977 — PFEL objected to each of respondents' interrogatories and document requests.

September 21, 1977 — Respondents served interrogatories and document requests upon States, seeking, among other things, all documents of States and its agents relating to rebating by any person to States' customers for the period from March 21, 1973 to March 21, 1977.

October 17, 1977 — States objected to each of respondents' interrogatories and document requests.

December 20, 1977 — The District Court ordered PFEL and States to comply in full with respondents' document requests and interrogatories (Dec. 20, 1977 Order, p. 2).

January 16, 1978 — Petitioners served answers to interrogatories and produced documents. Petitioners did not produce any documents listing the amounts or recipients of rebates paid by petitioners, and did not produce any documents from the files of their agents.

January 31, 1978 — After taking compliance depositions of petitioners, respondents filed a motion for sanctions based on petitioners' failure to produce documents and answer interrogatories as ordered by the District Court.

February 28, 1978 — The District Court did not grant respondents' motion for sanctions, but again directed petitioners to provide full responses to respondents' interrogatories and document requests, including specifically documents in the possession of petitioners' agents (Feb. 28, 1978 Order, p. 3). Again, petitioners did not produce any documents listing the amounts or recipients of rebates paid by petitioners, and did not produce any documents from the files of their agents.

July 6, 1978 — The District Court for the third time ordered petitioners and their affiliates to produce rebating documents, and directed petitioners to file affidavits attesting to the completeness of the production (July 6, 1978 Order, pp. 5-6). The District Court also directed petitioners to instruct their present and former agents in the Far East to permit respondents' representatives immediate and continuous access to search for documents relating to rebating (July 6, 1978 Order, pp. 2-4).

July 10-22, 1978 — Pursuant to the District Court's order of July 6, 1978, respondents' representatives attempted to obtain access to offices of petitioners' present and former agents in Japan, Hong Kong, and Taiwan. Although some documents were produced, respondents' representatives were substantially denied the immediate and continuous access required by the District Court's order.

August 21, 1978 — Without producing any additional documents, States filed an affidavit in purported compliance with the District Court's order of July 6, 1978. The affidavit on its face failed to comply with the District Court's order.

August 22, 1978 — Without producing any additional documents, PFEL filed an affidavit in purported compliance with the July 6, 1978 order. The affidavit on its face failed to comply with the District Court's order.

October 17, 1978 — States served and filed a further affidavit, which likewise failed to meet the requirements of the July 6, 1978 order.

4. Respondents' Motion for Sanctions and the District Court's Order Directing an Evidentiary Hearing

On July 24, 1978, respondents served and filed a motion for dismissal of petitioners' complaints and for further sanctions. This motion was based upon two fundamental grounds: (1) petitioners' willful misrepresentation of material facts to respondents and to the District Court (Pet. A-2-A-4); and (2) petitioners' willful failure to obey the discovery orders of the District Court (Pet. A-4).* After

* Petitioners allege in their petition for certiorari that the sole ground of respondents' motion for sanctions is that petitioners, contrary to their denials, engaged in rebating (Pet. 10). This allegation is false. As made clear by the order which petitioners seek to review (Pet. A-2-A-4), respondents' motion is based both upon petitioners' knowing misrepresentations and upon their willful failure to obey the orders of the District Court.

examining respondents' motion for sanctions and petitioners' answering papers, the District Court expressly determined that respondents' motion for sanctions is a proper subject for an evidentiary hearing by the Court (Pet. A-5).

The evidence supporting respondents' motion for sanctions need not be reviewed in detail in this brief. Petitioners' own assessment of the strength of this evidence is suggested by the many steps which petitioners have taken to forestall the holding of the evidentiary hearing, which have included numerous requests for adjournments, extensive discovery on a counter-motion for sanctions against respondents, and a petition for mandamus to the Court of Appeals, followed by the petition for certiorari which is now before this Court.

5. The Denial of Mandamus by the Court of Appeals

On January 16, 1979, petitioners filed a petition for mandamus with the United States Court of Appeals for the Ninth Circuit, contending that the holding of an evidentiary hearing would violate their right to a jury trial. On April 20, 1979, petitioners' petition for mandamus was denied by the Court of Appeals (Circuit Judges Sneed and Anderson) (Pet. B-1).

Reasons for Denying the Writ

The rulings of the District Court and the Court of Appeals are entirely consistent with the uniform holding of the courts that evidentiary hearings on motions for discovery sanctions are necessary and appropriate to the administration of justice and do not contravene the Seventh Amendment. Petitioners have cited no authority to the contrary, and have presented no issue worthy of review by this Court.

1. Willful Deception or Failure to Obey Court Orders in the Course of Discovery Calls for the Imposition of Sanctions

Willful deception or failure to obey court orders in the course of discovery calls for the imposition of sanctions. *See, e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640-43 (1976); *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 208-13 (1958). This principle has assumed increasing importance at a time of rapidly growing concern with abuses of the discovery process.*

In *G-K Properties* v. *Redevelopment Agency*, 577 F.2d 645 (9th Cir. 1978), for example, the District Court dismissed an action for just compensation because of plaintiffs' knowing failure to produce financial records. The Court of Appeals emphatically upheld the District Court's dismissal of the action:

> "Here the court dismissed the plaintiffs' action with prejudice. It acted properly in so doing. We encourage such orders. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism. . . ." 577 F.2d at 647.

Similarly, in *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976), this Court

* *See, e.g.*, W. H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 290 (1978); ABA, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159, 192-94 (1976); ABA Section of Litigation, *Report of the Special Committee for the Study of Discovery Abuse* 24-25 (1977).

stressed that the sanction of dismissal serves the important function of deterring other litigants who might be tempted to abuse the discovery process. Lower Federal courts have repeatedly held that an action may be dismissed for willful failure to comply with a discovery order.*

2. The District Court May Hold an Evidentiary Hearing to Resolve Disputed Factual Issues on a Motion for Sanctions

In determining whether the sanction of dismissal or other sanctions should be imposed, the courts are often required to resolve disputed factual issues. For example, a potential issue in any case where the sanction of dismissal is involved is whether the defaulting party's conduct was willful. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 212 (1958). The issue of willfulness is often disputed, and when it is the courts are required both to find facts and to make inferences from such facts. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 211-13 (1958); *G-K Properties* v. *Redevelopment Agency*, 577 F.2d 645, 648 (9th Cir. 1978). Where a disputed issue of fact is presented on a motion for sanctions, the District Court may and often should hold

* *See, e.g., Paine, Webber, Jackson & Curtis, Inc.* v. *Inmobiliaria Melia de Puerto Rico, Inc.*, 543 F.2d 3, 6 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *Emerick* v. *Fenick Industries, Inc.*, 539 F.2d 1379, 1381 (5th Cir. 1976); *Von Brimer* v. *Whirlpool Corp.*, 536 F.2d 838, 843 (9th Cir. 1976); *Fox* v. *Studebaker-Worthington, Inc.*, 516 F.2d 989, 992-93 (8th Cir. 1975); *General Dynamics Corp.* v. *Selb Mfg. Co.*, 481 F.2d 1204, 1210-11 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Kelley* v. *United States*, 338 F.2d 328, 329 (1st Cir. 1964); *Independent Investor Protective League* v. *Touche Ross & Co.*, 25 Fed. R. Serv. 2d 222, 226 (2d Cir. 1978); *United States* v. *Moss-American, Inc.*, 78 F.R.D. 214, 216-17 (E.D. Wis. 1978); *cf., e.g., Ohio* v. *Arthur Andersen & Co.*, 570 F.2d 1370, 1374-75 (10th Cir.), *cert. denied*, 99 S. Ct. 114 (1978).

an evidentiary hearing to resolve it. *See, e.g., Flaks* v. *Koegel,* 504 F.2d 702, 712 (2d Cir. 1974).

In *Fox* v. *Studebaker-Worthington, Inc.,* 516 F.2d 989 (8th Cir. 1975), for example, the District Court dismissed the plaintiffs' complaint after holding an evidentiary hearing and resolving disputed issues of credibility. In that case Anthony Fox, one of the three plaintiffs, admitted that he had engaged in "bugging" of conversations in defendants' offices, including conversations with defendants' trial counsel. Fox first claimed that he had destroyed all tapes of these conversations, and then later said that he had retained some of them. Still later, Fox claimed that no bugging had ever taken place. Although plaintiffs' counsel conceded that a dismissal of the complaint was appropriate as to Fox, plaintiffs contended that the complaint should not be dismissed as to the other two plaintiffs, who claimed to be innocent of knowledge of Fox's misconduct. After holding a hearing at which these plaintiffs testified, the District Court rejected this contention as "inherently implausible", and the Court of Appeals affirmed, stating that "[c]redibility of witnesses is for the trier of fact to determine." 516 F.2d at 993.

Similarly, in *Independent Investor Protective League* v. *Touche Ross & Co.,* 25 Fed. R. Serv. 2d 222 (2d Cir. 1978), the Court of Appeals affirmed the dismissal of a complaint because of plaintiffs' failure timely to file interrogatory answers in compliance with a court order. In deciding the sanctions motion, the District Court held a three-day evidentiary hearing concerning the circumstances under which plaintiffs' purported answers to interrogatories were served, and concluded that there was "no credible evidence" that the interrogatory answers were timely executed and served. 25 Fed. R. Serv. 2d at 225.

Again, in *Von Brimer* v. *Whirlpool Corp.,* 536 F.2d 838 (9th Cir. 1976), the plaintiff failed to produce documents as required by a court order. At trial, the plaintiff attempted to introduce the documents to prove a critical part of his case. The District Court ruled that such evidence should be excluded pursuant to Rule 37(b)(2)(B), and this ruling was affirmed by the Court of Appeals. In reaching its conclusion, the District Court received testimony and made findings of fact concerning the documents involved. 536 F.2d at 844.

Thus it is well established that the District Court may hold an evidentiary hearing to resolve disputed issues of fact on a motion for the sanction of dismissal or for other sanctions. The District Court's order directing an evidentiary hearing on defendants' motion for sanctions in the present case is thus an entirely proper exercise of the District Court's jurisdiction.

3. The Holding of an Evidentiary Hearing on a Motion for Sanctions Does Not Violate the Right to a Jury Trial

In their petition for certiorari, petitioners cite no authority whatever for the proposition that the holding of an evidentiary hearing on a motion for sanctions violates the right to a jury trial.* In fact, all of the authorities in point hold that the granting of sanctions does not violate the right to a jury trial.

In *McMullen* v. *Travelers Insurance Co.,* 278 F.2d 834 (9th Cir.), *cert. denied,* 364 U.S. 867 (1960), the plaintiff's

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* Petitioners' petition for certiorari relies upon *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959) (Pet. 16-17). The *Beacon Theatres* case, however, had nothing to do with the issue presented in the present case. Instead, *Beacon Theatres* concerned the right to a jury trial in a case where legal and equitable claims involve common factual issues.

complaint was dismissed because he refused to submit to a physical examination as ordered by the Court. On appeal, the plaintiff contended that this dismissal violated his right to a jury trial. The Court of Appeals affirmed the District Court, holding:

> "McMullen insists he was still entitled to a jury trial on all issues, including his physical condition. The right to a jury trial depends upon having an issue to go to a jury. By his own act or inaction, McMullen lost his. . . ." 278 F.2d at 835.

Similarly, in *Rohauer* v. *Eastin-Phelan Corp.*, 499 F.2d 120 (8th Cir. 1974), the plaintiff's complaint was dismissed for willful failure to comply with the discovery orders of the Court. The plaintiff argued on appeal that this violated his Seventh Amendment right to trial by jury. The Court of Appeals rejected this argument as "frivolous". 499 F.2d at 122.

The conclusion that there is no right to jury trial on a motion for sanctions under Rule 37(b) of the Federal Rules of Civil Procedure is confirmed by the history of discovery and discovery sanctions in the Federal courts. This Court has held that the Seventh Amendment preserves the "fundamental elements" of the right to trial by jury as it existed in 1791. *Parklane Hosiery Co.* v. *Shore,* 99 S. Ct. 645, 654 (1979), *quoting Galloway* v. *United States,* 319 U.S. 372, 392 (1943). There was no right to a jury trial on issues of discovery and discovery sanctions in 1791.

In 1791, the method for obtaining discovery and discovery sanctions in an action at law was by a separate bill in equity for discovery in aid of the action at law. *See, e.g., Bas* v. *Steele,* 2 Fed. Cas. 988, 990-91 (C.C.D. Pa. 1818) (No. 1,088) (Bushrod Washington, *J.*), *quoted in Carpenter* v. *Winn,* 221 U.S. 533, 542 (1911); *Geyger's Lessee* v. *Geyger,* 2 U.S. (2 Dall.) 332 (C.C.D. Pa. 1795) (Paterson, *J.*). If the defendant raised a factual issue in response to the bill in equity, it was resolved by the Court, sitting without a jury. *See, e.g., Bas* v. *Steele,* 2 Fed. Cas. 988, 991 (C.C.D. Pa. 1818) (No. 1,088) (Bushrod Washington, *J.*), *quoted in Carpenter* v. *Winn,* 221 U.S. 533, 542 (1911). As a sanction to enforce its determination, the court of equity could enjoin the prosecution of the action at law. *See, e.g., Carpenter* v. *Winn,* 221 U.S. 533, 539 (1911).

Section 15 of the Judiciary Act of 1789, 1 Stat. 82 (1789), made available a streamlined statutory version of the bill in equity for discovery for use in obtaining evidence for use in the trial of an action at law.* *See, e.g., Carpenter* v. *Winn,* 221 U.S. 533, 537-41 (1911); *Hylton* v. *Brown,* 12 Fed. Cas. 1123, 1124 (C.C.D. Pa. 1806) (No. 6,981) (Bushrod Washington, *J.*); *Geyger's Lessee* v. *Geyger,* 2 U.S. (2 Dall.) 332 (C.C.D. Pa. 1795) (Paterson, *J.*). Section 15 of the Judiciary Act of 1789 provided that Federal courts could compel parties to produce books or writings "in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of production in chancery;" that in the case of noncompliance by a plaintiff the court could "give the like judgment for the defendant as in cases of nonsuit;" and that in the case of noncompliance by a defendant the court could "give judgment against him or her by default."

As in the case of the bill in equity for discovery, any factual issue arising under Section 15 of the Judiciary Act was resolved by the Court without a jury, either before or

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* The bill in equity for discovery remained available as a means of pretrial discovery in an action at law, which was not within the scope of Section 15 of the Judiciary Act of 1789. *See, e.g., Sinclair Refining Co.* v. *Jenkins Petroleum Process Co.,* 289 U.S. 689, 693 (1933); *Carpenter* v. *Winn,* 221 U.S. 533, 537-41 (1911).

during the trial of the main action at law. *See, e.g., Carpenter* v. *Winn,* 221 U.S. 533, 541 (1911); *Dunham* v. *Riley,* 8 Fed. Cas. 48 (C.C.D. Pa. 1821) (No. 4,155) (Bushrod Washington, *J.*); *Bas* v. *Steele,* 2 Fed. Cas. 988, 990-91 (C.C.D. Pa. 1818) (No. 1,088) (Bushrod Washington, *J.*), *quoted in Carpenter* v. *Winn,* 221 U.S. 533, 542-43 (1911). Thus the history of the bill in equity for discovery and of Section 15 of the Judiciary Act of 1789 confirms that there was no right to jury trial in 1791 on issues of discovery and discovery sanctions.*

The conclusion that there is no right to a jury trial on a motion for sanctions is supported by principle as well as by history and authority. The administration of justice would be gravely impaired if the District Court lacked the power to employ a full range of sanctions—including dismissal—against a party guilty of willful misconduct or disobedience to Court orders. *See, e.g., National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 643 (1976); *Link* v. *Wabash R.R.,* 370 U.S. 626, 629-30 (1962). Imposition of the sanction of dismissal does not offend any right to jury trial because, as the Court of Appeals pointed out in *McMullen* v. *Travelers Insurance Co.,* 278 F.2d 834, 835 (9th Cir.), *cert. denied,* 364 U.S. 867 (1960), the right to a jury trial depends upon having an issue to go to the jury. A party who engages in knowing abuse of the discovery process forfeits the right to take any issue before the jury. This is the implicit holding of all of the cases cited at pages 12-15 above, which approve the dismissal of complaints for abuse of the discovery process.

* Section 15 of the Judiciary Act of 1789 is particularly probative of the original understanding of the Seventh Amendment because it was enacted by the same First Congress which formulated the Bill of Rights. *See, e.g.,* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 Harv. L. Rev. 49, 54-56 (1923).

If the rule were otherwise, a party could with impunity engage in attempts to withhold essential evidence and to deceive the Court and the other parties, secure in the knowledge that, even if his misconduct were detected, he would have an indefeasible right to insist upon a plenary jury trial on the merits. Such a rule would fatally undermine the deterrent effect of discovery sanctions, the importance of which was stressed by this Court in *National Hockey League* v. *Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 642-43 (1976).

For all of these reasons, petitioners' contention that the holding of an evidentiary hearing on respondents' motion for sanctions would deny petitioners their right to a jury trial under the Seventh Amendment is wholly without merit.*

* In an attempt to bolster their jury trial contention, petitioners assert that all of the grounds upon which respondents' motion for sanctions is based involve the same factual issues as petitioners' denials of rebating in their replies to Sea-Land's counterclaims (Pet. 13-15). This assertion is not only irrelevant (since willful misrepresentations affecting issues raised by the pleadings furnish at least as firm a basis for sanctions as misrepresentations affecting other issues), but also contrary to fact. The denials of rebating in petitioners' replies encompass petitioners and their agents, and speak as of December 23, 1976, February 3, 1977, and July 12, 1977 (*see* pp. 5-6 *supra*). Petitioners' other denials of rebating encompass payments made by any person (*see* pp. 6-7 *supra*), and speak as of October 15, 1976, November 29, 1976, February 28, 1977, March 21, 1977, and July 1, 1977 (*see* pp. 5-7 *supra*).

Moreover, respondents' motion for sanctions is based not only upon petitioners' misrepresentations of rebating, but also upon their failure to obey the discovery orders of the District Court, which plainly involves issues entirely distinct from those raised by the pleadings.

Finally, petitioners suggest that the District Court has ruled that its findings of fact on the motion for sanctions would be binding upon the parties in any later stages of these actions, including trial (Pet. 21 n.*). In fact, the District Court has made no such ruling.

4. The Court of Appeals Properly Exercised Its Discretion in Declining to Issue a Writ of Mandamus

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *E.g., Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976); *Will* v. *United States,* 389 U.S. 90, 95 (1967); *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 382-85 (1953). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Kerr* v. *United States District Court,* 426 U.S. 394, 402 (1976), *quoting Will* v. *United States,* 389 U.S. 90, 95 (1967). The party seeking issuance of a writ of mandamus must show that his right to the issuance of the writ is "clear and indisputable." *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976), *quoting Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379, 384 (1953).

In light of these well established criteria for the issuance of a writ of mandamus, the refusal of the Court of Appeals to grant petitioners' petition for mandamus was plainly correct. Far from presenting a "clear and indisputable" case for a writ of mandamus, petitioners' argument is without any support in history, principle, or authority. Far from establishing a judicial "usurpation of power", the record in this case reveals a fully justified determination by the District Court to conduct an evidentiary hearing to resolve grave and substantial questions raised by petitioners' repeated abuse of the discovery process.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: May 29, 1979

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1723

STATES STEAMSHIP COMPANY and
PACIFIC FAR EAST LINE, INC.,
Petitioners,

VS.

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(R. J. REYNOLDS TOBACCO COMPANY and
SEA-LAND SERVICE, INC.,
Real Parties in Interest),
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

THE ISSUES TO BE TRIED

Respondents do not contest[1] the fact that the central issue to be tried by the District Court pursuant to its order of January 9, 1979 is that raised by the Sea-Land

[1]Respondents fail in the space of 20 pages of opposition to attempt an identification of the issues to be tried by the District Court. Thus, there is no mention of the District Court's announcement that it would weigh the credibility of witnesses and conduct an "actual trial" and no citation or discussion of any legal authorities pertinent to these critical procedural facts upon which petitioners rely.

counterclaims, *viz.:* whether petitioners paid rebates or falsely denied the payment of rebates.[2]

In fact, respondents themselves admitted to the District Court that rebating by PFEL as alleged in the Sea-Land counterclaims was in issue and had not been shown:

> "[Counsel for Respondents]: . . . it becomes clear there really are two questions here.
>
> "Number one, did PFEL rebate?
>
> "Number two, did that rebating start before October 15, 1976?"[3]

The Sea-Land counterclaims allege, in substance, that petitioners paid rebates, failed to disclose rebates and issued false denials of rebating[4]. As stated, these allegations were denied by petitioners and a jury trial as to the issues raised thereby was demanded.[5]

The order of January 9, 1979 specifies as issues to be tried the contention by defendants that petitioners made certain "false representations" *viz.:*

> "PFEL's denials, in its reply dated December 22, 1976, of paragraphs 27 and 29 of Sea-Land's Answer and Counterclaim dated November 9, 1976;

[2]E.g., Compare: Answer and Counterclaim of Defendant Sea-Land Service, Inc., ¶¶ 27, 30 [Petition, App. D, pp. 6, 7] with Order Directing Evidentiary Hearing, ¶ 1(a)(ii) [Petition, App. A, p. 2]. For further information, petitioners attach as Appendix 1 a portion of the transcript of the hearing before the District Court on January 2, 1979 containing colloquy between the Court and counsel pertinent to the issues to be tried.

[3]Proceedings before United States Magistrate pursuant to order of Reference, November 1, 1978, TR. p. 103:12-16.

[4]Pet., App. D, ¶¶ 27, 29; App. G, ¶¶ 38, 40; App. J, ¶¶ 23, 25.

[5]Pet., App. F, pp. 2, 6; App. H, pp. 2, 6; App. K, pp. 1, 2 and 5.

> "PFEL's denial, in its reply dated February 3, 1977, of paragraphs 38 and 40 of Sea-Land's Answer to Amended Complaint and Counterclaim dated January 7, 1977;
>
> "States' denial, in its reply served on July 12, 1977, of paragraphs 23 and 25 of Sea-Land's Answer and Counterclaim dated June 22, 1977."[6]

Respondents nowhere contend or suggest to this Court that the fact of rebating as alleged in the Sea-Land counterclaims has been established, nor do they suggest that there is no genuine issue as to any material fact concerning this issue. As noted by respondents, petitioners have, in answer to interrogatories, deposition testimony and in the pleadings:

> "consistently denied the payment of rebates".[7]

It must at this point be stressed that the Sea-Land counterclaims themselves allege both rebating and the "false denial of rebating" by petitioners. Clearly, the matter of "false denial of rebating", raised by the Sea-Land counterclaims and specified in the order of January 9, 1979

[6]Pet., App. A. pp. 2, 3.

[7]Opp. Brief, p. 5. Petitioners attach as Appendix 2 hereto pages 22 and 68 of the transcript of the hearing before the District Court held on December 13, 1978, which constitutes the sole authority for the statement by respondents that:

> "Petitioners' attorney admitted to the District Court that PFEL had paid rebates until the end of 1977 (Dec. 13, 1978 TR. 68). He asserted that PFEL did not pay rebates before October 15, 1976, although he admitted that an agent of PFEL did pay rebates before October 15, 1976 (Dec. 13, 1978 TR. p. 22)." (Opp. Brief, p. 7).

The most temperate observation that can be made concerning respondents' claim is that it is demonstrably, by reference to the very record they cite, false.

presents the same issue. More importantly, it seems an impossibility to try the issue of "false denial" of rebating without trying and determining whether or not rebates were paid as alleged in the counterclaims.

In the context of these proceedings, the logical sequence of issues to be determined would be, as suggested by the allegations of the counterclaims themselves:

> (1) Did petitioners in fact engage in rebating as alleged in the counterclaims, and, if so;
>
> (2) Did petitioners falsely deny the payment of rebates.

Respondents attempt to eviscerate the substance of the District Court's order of January 9, 1979 by telling this Court that petitioners object to the "holding of a hearing".[8] This is not only silly, it ignores the record fact that the District Court has stated that it will not only "hold a hearing" but weigh the credibility of witnesses and make findings of fact as to the issues specified in its January 9, 1979 order, including the issue of rebating. The District Court stated that it would:

> "... pass upon what I consider to be actual facts and properly admissible facts as though this were an actual trial on this very issue."[9]

The order of January 9, 1979 contemplates an actual trial on the issue of rebating with tens of thousands of documents moved into evidence and numerous live witnesses

[8]Opp. Brief, p. 4.
[9]Pet., p. 11.

being called by respondents from all over the United States and from overseas.[10]

Petitioners submit that, no matter how the issue is tortured or manipulated, the District Court must take evidence on and determine the fact of rebating as alleged in the counterclaims before it can begin to determine whether rebating has been falsely denied.

EQUITY JURISDICTION CONFERRED BY F.R.CIV.P. RULE 37(b) DOES NOT EMPOWER A DISTRICT COURT TO TRY CONTESTED ISSUES OF FACT RAISED IN ACTIONS AT LAW CONCERNING WHICH JURY TRIAL HAS BEEN DEMANDED

A. Equity Jurisdiction Under F.R. Civ. P. Rule 37(b)

Respondents have now abandoned any reliance upon Rules 16, 41(b) or 56 of the Federal Rules of Civil Pro-

[10]Defendants have advised the District Court that the trial on the rebating issue is expected to last at least several weeks and perhaps longer. Petitioners have received tens of thousands of documents which respondents intend to move into evidence in support of the rebating issue to be tried. Respondents have recently served trial subpoenas and notified the District Court and petitioners that numerous witnesses, some coming from overseas, will be called by respondents during the course of the mini-trial.

Putting the question of petitioners' right to jury trial to the side, it is difficult to imagine how a proceeding of the nature contemplated conforms with the mandate of Rule 1 of the Federal Rules of Civil Procedure or how it squares with the rightfully expressed concern of this Court as to the crowding of federal dockets and the prejudicial delays incident thereto. This case now has more than 600 entries on the District Court's docket sheet evidencing the strenuous efforts expended by R. J. Reynolds Tobacco Company to extricate itself, through procedural stratagem, from serious antitrust litigation. The 600 entries exist on the docket sheet notwithstanding the fact that petitioners have not as yet, 2½ years after the complaints were filed, been accorded any discovery whatsoever on the major monopoly allegations of their complaints.

cedure in connection with their July 24, 1978 motion to dismiss.[11] This circumstance follows from their forced recognition of the fact that the District Court is not employing the hearing in question in order to formulate issues for trial pursuant to Rule 16 or to make a determination as to the existence of genuine issues of material fact pursuant to Rule 56, and from their implicit admission that Rule 41(b) speaks most directly to the question of actions properly tried by the Court without a jury.

Petitioners agree with the principle that, in the usual circumstances, a party has no right to jury trial on a Rule 37(b) motion for sanctions.

Petitioners' agreement springs from the fact that a motion made under Rule 37(b) is properly based upon an admitted or uncontrovertible non-compliance with valid court order or other wrongdoing, a threshold circumstance not present here,[12] and upon the fact that, in the normal course, a Rule 37(b) hearing is conducted so that the trial court might consider the presence and degree of any willfulness attendant to the non-compliance or wrongdoing.[13] Assuming

[11]As noted, respondents originally filed their motion "for an order pursuant to Rules 16, 37(b), 41(b), and 56", Pet., p. 9. Respondents now state that their motion is one "for sanctions pursuant to Rule 37(b) of the Federal Rules of Civil Procedure", Opp. Brief, p. 4.

[12]Respondents fail to advise this ourt that on June 2, 1978, the District Court denied respondents' "motion for sanctions based on petitioners' failure to produce documents and answer interrogatories as ordered by the District Court". Compare: Opp. Brief, p 8 with ¶ 3 of the Order of June 2, 1978, attached hereto as Appendix. 3.

[13]— *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers,* 357 U.S. 197 (1958) involved a request made pursuant to Rule 34 of the Federal Rules of Civil Procedure for particular, admittedly relevant, documents shown to

the trial court finds willfulness, it then determines the nature of the sanction to be imposed.

exist. There was an admitted complete failure to produce the documents as required by valid court order. The party failing to produce attempted to excuse compliance, i.e. demonstrate the absence of willfulness, on the ground that the documents were not within its control. The District Court's dismissal of the complaint was affirmed on appeal but reversed by this Court after a discussion of evidence pertinent to the issue of willfulness.

— *G-K Properties v. Redevelopment Agency,* 577 F.2d 645 (9th Cir. 1978) went forward on the basis of an uncontested failure to produce particular, admittedly relevant documents as required by court order coupled with a failure to file an affidavit showing that the documents subject to the court order did not exist. Subsequently, it was admitted by the party resisting discovery that the documents in question did exist and the District Court entered its order of dismissal.

— *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639 (1976) involved an admitted and continuing failure to file answers to interrogatories concerning critical issues as required by court order. When, after completely exhausting the patience of the District Court, answers were filed, they were so grossly inadequate as to support a further finding of willful failure to comply with court order and make dismissal appropriate.

— *Flaks v. Koegel,* 504 F.2d 702 (2d Cir. 1974) stands for the proposition that, when a District Court considers a sanction as severe as dismissal, a hearing on the issue of "willfulness" of an admitted failure to answer interrogatories and to appear for a deposition should be held prior to a decision by the District Court.

— *McMullen v. Travelers Insurance Co.,* 278 F.2d 834 (9th Cir.), *cert. denied,* 364 U.S. 867 (1960) involved the issue of whether a persistent and admitted refusal by a party to comply with a Rule 35(a) order requiring submission to physical examination was a ground sufficient to cause dismissal of the complaint of the party so refusing.

— *Rohauer v. Eastin-Phelan Corp.,* 499 F.2d 120 (8th Cir. 1974) is a case which involved admitted and repeated failures to comply with valid court orders coupled with unexcused failure to appear to show cause concerning the reason for the admitted non-compliance, the court stated:

> "In the context of this case, the now posited constitutional claims of plaintiff of lack of 5th Amendment due process and 7th Amendment right of trial by jury are frivolous." *Id.* at p. 22.

Petitioners agree with the observation of the *Rohauer* court and have previously advised the District Court of their agreement with this principle.

In arguing for the propriety of the trial contemplated by the January 9, 1979 order of the District Court, respondents rely entirely on the provisions of Rule 37(b) of the Federal Rules of Civil Procedure, as those provisions gather force and meaning from the common law, Section 15 of the Judiciary Act of 1789, 1 Stat. 82 (1789) and other sources.

Petitioners are entirely in agreement with the proposition advanced by respondents, *viz.*: that the District Court purports to be engaged in the exercise of equity powers conferred upon it by Rule 37(b) and its antecedents.

The problem, and thus the issue presented here, arises from the uncontested fact that the District Court threatens to employ its equity power to decide central issues raised by the Sea-Land counterclaims[14]—actions at law for treble damages—concerning which petitioners have properly demanded jury trial.[15]

B. The Actions at Law

Respondents do not dispute that the Sea-Land counterclaims are actions at law. They do not dispute the fact of

[14]The Sea-Land counterclaims purport to allege violations of Sections 1 and 2 of the Sherman Act [15 U.S.C. §§ 1, 2] and other federal statutes and seek treble damages pursuant to Section 4 of the Clayton Act, [15 U.S.C. § 15], Pet., App. D, pp. 7, 8; App. J, pp. 6, 7.

[15]It must be noted and stressed that both States and PFEL have specifically alleged, and Sea-Land has denied, that the Sea-Land counterclaims were brought in bad faith in furtherance of the violations alleged in the complaints filed by States and PFEL (Petition, App. F, ¶¶ 12, 13; App. H, ¶¶ 12, 13; App. K, ¶¶ 12, 13.) Thus, in trying the allegations of rebating raised by the Sea-Land counterclaims, the District Court will be required to try and determine the issue of bad faith raised by petitioners with respect thereto concerning which jury trial has also been demanded (Petition, App. F, p. 6; App. H, p. 6; App. K, p. 5).

proper jury demand, nor do they dispute that the District Court is going to conduct a non-jury trial[16] and make findings on the issue of rebating raised in the counterclaims. Respondents simply assert that since they have included the rebating issue in a motion filed by them and phrased in terms of F.R.Civ.P. Rule 37(b), the District Court's equity power provided by that rule extends to the counterclaim issues and that the District Court is therefore free to ignore petitioners' Rule 38 jury demands.[17] Petitioners suggest that this is an erroneous view of the law.

C. The Teaching of Beacon Theatres

In *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959) the petitioner sought a writ of mandamus to require a District Court judge to vacate an order striking a jury demand and separating, for non-jury trial, issues joined by a complaint and answer from those joined by a counterclaim and cross-complaint, *Beacon Theatres v. Westover,* 252 F.2d 864, 868 (9th Cir. 1958). The Ninth Circuit refused the writ. This Court granted certiorari because:

> "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our

[16]On June 1, 1979, respondents themselves characterized the proceedings contemplated by the January 9, 1979 order of the District Court:

> "We have spent extreme efforts in preparing for it carefully so it would be an expedited trial. . . . we feel we should take the full testimony at the trial, having given up the opportunity to have pretrial depositions in order to avoid this procedural problem." Hearing, June 1, 1979, TR. p. 8.

[17]In the footnote at page 19 of their Brief in Opposition, respondents admit that the issues involved in the minitrial are those raised by the pleadings, a fact established by the explicit language of the January 9, 1979 order and not altered by reference to the "speaking date" of the denials interposed to the allegations of rebating contained in the Sea-Land counterclaim.

history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care" Id. at 501.

This instant petition, like that in *Beacon, supra,* involves a situation in which a District Court has, in the apparent exercise of its equity powers set out to try issues raised in an action at law. In *Beacon, supra,* the central issue to be tried by the Court in equity was the reasonableness of "clearances", an issue common to the allegations of the complaint, counterclaim and cross-complaint. In our case, the central issue to be tried by the Court, sitting in equity without a jury, is the "payment of rebates" and the "false denials of rebating", an issue common and central to the allegations of the Sea-Land counterclaims and respondents' Rule 37(b) motion.

Respondents' recital that their pending Rule 37(b) motion for dismissal and sanctions is analogous to a "separate bill in equity for discovery in aid of the action at law[18] is, as far as it goes, helpful in illuminating the issue presented by petitioners. As noted, petitioners agree that the order of January 9, 1979 must be viewed as an attempt by the District Court to exercise what it conceives as its equitable jurisdiction. The issue, not addressed by respondents, is whether the District Court is overstepping the bounds of its equity jurisdiction in ordering a non-jury trial of the issue of rebating in the face of petitioners' proper demand for jury trial.[19] This Court's statement in *Beacon Theatres*

[18]Opp. Brief, p. 16.

[19]Petition, Appendix A, p. 5, ¶ 4:

"4. Plaintiffs have asserted that the *factual issues* raised by plaintiffs' denial of the contentions advanced by defendants in support of their Motion for Dismissal of Plaintiffs' Complaints and for Further Sanctions *are matters to be decided by the jury in a jury trial and not by the Court in an evidentiary hearing.*" (Emphasis added)

was that the right to a jury trial could not be lost by the blending of an action at law with one for equitable relief in aid of the legal action. Specifically, this Court stated:

> "Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. As this Court said in *Scott v. Neely* (citations omitted): 'In the Federal courts this [jury] trial right cannot be dispensed with, except by the assent of the parties entitled to it; *nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.*'" Id. at 510 (emphasis added)

Contrary to respondents' assertion, the *Beacon* rule does not in any way impinge upon the full exercise of a District Court's power to impose sanctions upon a proper showing of willful misconduct.[20] It does, quite rightfully, act to

[20]Petitioners strenuously reject the contention that they have been guilty of any misconduct, willful or otherwise. They do not address this matter and the evidence pertinent thereto because it is strictly irrelevant to the issue before this Court. This Court should be advised that, because of the serious procedural and other abuses perpetrated by respondents, the progress of these lawsuits in the District Court has been completely stalled for almost two full years. In view of the actual record in the District Court, it does not lie in the mouth of these respondents to speak of, let alone advance an argument based upon, "this era of crowded dockets" which "deprive[s] other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism." (Opp. Brief, p. 12)

restrain a District Court from itself trying contested issues of material fact raised in an action at law concerning which jury trial has been properly demanded and not waived and does so, petitioners submit, irrespective of whether a District Court purports to act pursuant to Rule 37(b) or any other provision of the Federal Rules of Civil Procedure.

It is clear that a determination of the issue of the payment of rebates and the false denial of rebating by the District Court judge might operate either by way of res judicata or collateral estoppel so as to conclude the parties with respect thereto at any subsequent trial of the treble damage claim advanced in the Sea-Land counterclaims.

Petitioners submit that their entitlement to jury trial of the allegations of rebating and false denial of rebating set forth in the Sea-Land counterclaims—actions at law for treble damages—cannot be denied merely because respondents have included these matters as issues in a motion couched in terms of F.R.Civ.P. Rule 37(b).

Petitioners submit that the January 9, 1979 order of the District Court and the trial thereby contemplated violates the rule announced by this Court in *Beacon Theatres, supra,* and deprives petitioners of their properly demanded right to jury trial. The writ prayed for herein should be granted not only to restore to petitioners their right to jury trial but to avoid a procedure which is extremely expensive, oppressive, and unnecessary, *viz.* not only are petitioners faced with a deprivation of their right to jury trial, they are faced with a most onerous requirement that they participate in a multiplicity of trials on the same issues.

CONCLUSION

For the reasons stated, petitioners submit that the writ prayed for herein should be granted and the order of the Court of Appeals for the Ninth Circuit reversed.

Dated, June 7, 1979
San Francisco, California

JOSEPH M. ALIOTO
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(Appendices Follow)

Appendices

Appendix 1

In the United States District Court
Northern District of California

Before: The Honorable Alfonso J. Zirpoli, Senior Judge

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and Mc Lean Industries, Inc., Defendants.	NO. C 76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc., and R. J. Reynolds Tobacco Company, Defendants.	NO. C 77-0582 AJZ

REPORTERS' TRANSCRIPT

Tuesday, January 2, 1979

Reported by: Shirley S. Linkerman
Paul Schiller

[28] Mr. Alioto: And then there is another matter that I would like to also bring to the attention of the Court, which I consider to be—

The Court: What is the other matter?

Mr. Alioto: The other matter is, your Honor, that from the Court's recent order, it is clear to me, or at least my understanding, that this mini-trial that is going to go forward on the motions to dismiss—

The Court: Yes?

Mr. Alioto: At least insofar as they relate to the motion by the defendants, is to resolve the very question that was raised by the pleadings.

Sea-Land, when they filed their counterclaim, your Honor, they alleged—

The Court: Pleadings have nothing to do with alleged fraud or obstruction.

The pleadings presume no fraud, they presume no obstruction.

Mr. Alioto: No, they did. As a matter of fact the allegation made, if I can read it to your Honor, the [29] allegation made in the counterclaim by Sea-Land, at page 5 of their answer and counterclaim, paragraph 26, was that "the acts of States" and this is the same language for P.F.E.L., "The acts of States in failing to disclose or in issuing false denials of the existence of rebates and other payments and practices alleged in certain paragraphs constitute violations of Sections One and Two of the Sherman Act," et cetera.

So that they claim that States and P.F.E.L. have failed to disclose or issued false denials of the existence of the rebates.

In response to that, we demanded a trial by jury in our complaint, of course, and when we responded to that allegation and also had our own counterclaim to that, we also made a demand for a jury trial on our defense on the issues raised by Sea-Land.

The Court: Are you talking about States alone now?

Mr. Alioto: Both States and P.F.E.L. . . .

[30] Mr. Alioto: Your Honor, the Court first of all is, in fact, as I understand it, going to conduct a mini-trial. The point is that all of the witnesses deny that P.F.E.L or States paid rebates during the relevant time period.

[31] In order to say otherwise, the Court would have to decide the credibility of these witnesses on the very issue which is framed by the pleadings for which the parties have demanded jury trial.

So that if the Court decides the credibility of the witnesses, this is not, Your Honor—

The Court: If there is no question that a fraud has been perpetrated on the Court, the Court is under no obligation to go through a jury trial.

Mr. Alioto: Your Honor, in the cases which I think the Court is talking about, you have confessions by the parties, either by the Government or by someone else, that they gave false testimony, or they gave false evidence. These are contentions, and the question then becomes sanctions.

But I don't believe, Your Honor, that there is any case in which the credibility of the witness, where it is contested, where the witness or witness' credibility is in issue, that the Court ventures on the kind of thing that the Court is talking about.

The Court: Mr. Alioto, I am satisfied that I have before me a proper motion to consider on the question of sanctions.

What my ruling will be I don't know, and I won't know until I have gone into it in the detail that I expect [32] you gentlemen to go into it at the time of presentation, so I don't know. . . .

[36] Mr. Alioto: Yes, but their motion, Your Honor, is that—their motion to dismiss is that P.F.E.L. and States were rebating during the relevant time period, but concealed and denied that. And we denied it in the pleadings for which we demanded a trial by jury.

For the Court to entertain a mini-trial to determine that issue, the Court must, in effect, try the case that is framed by the pleading.

And to decide in their favor, the Court must [37] determine the credibility of the witnesses and the evidence, the so-called prima facie evidence of their counterclaim. . . .

Mr. Alioto: All right. Here is the point I would like to raise with Your Honor. And I would like time to do it.

The Court: You're saying to me that if their issue is a fact involving credibility of witnesses, I have no right to dismiss the case, that's what you're saying, in substance and effect.

Mr. Alioto: That's only part.

Your Honor, the motion—the Motion to Dismiss is based upon an allegation that P.F.E.L. and States failed to disclose, or falsely represented that they did not engage in rebating during the relevant time period.

The Court: When they in fact knew that they had so engaged?

Mr. Alioto: Correct.

The Court: That's the point.

[38] Mr. Alioto: Correct.

And that is the issue——

The Court: Well, all right.

Mr. Alioto:—that they have raised in the counterclaim, which both P.F.E.L. and States has denied, have denied, and for which——

The Court: Well, they didn't know you were going to necessarily deny it. You might have admitted it.

Mr. Alioto: We denied it.

The Court: I know. Let's assume you admitted it.

Mr. Alioto: We didn't admit. We denied it.

That's the basis of their complaint.

The Court: You deny it, and they say this denial is false, and it's a deliberate denial, and a fraud upon the Court. . . .

Mr. Alioto:Your Honor, Your Honor, every complaint that has—every answer that is filed by a defendant, where the defendant denies the charge made, it goes to a trial.

Plaintiffs have won cases. The fact that they [39] won—

The Court: Yes, but you aren't permitted—you aren't permitted—as an officer of a court, you should never deny that which you believe to be true.

Mr. Alioto: Correct. But if you believe the denial is correct——

The Court: Well——

Mr. Alioto: ——and all of the witnesses—

The Court: They are going to show the circumstances —they hope to show, I should say—they hope to show that the circumstances are such that there was no basis in fact or in law for your denial.

And if there was no basis in fact or in law for your denial, then a fraud is presumably being practiced upon the Court.

On the other hand, by way of illustration, counsel could have—well, I'm not going to go into what you could have done. Okay.

Mr. Alioto: Your Honor, the fact of the matter is that all of the witnesses for both P.F.E.L. and for States have denied the charge.

The Court: Well, all right.

Mr. Alioto: All right. This is what I would request, Your Honor.

The Court: All right.

[40] Mr. Alioto: I would request permission—

The Court: Yes.

Mr. Alioto: I would request permission for some time to—I believe that this is a very substantial question on the denial of the demand for jury trial by both States and P.F.E.L.

I would request that the court permit me to file a Writ of Mandamus no later than—today is Tuesday—no later than Thursday.

The Court: Well, you can always file it any time before the hearing. Nobody is going to stop you.

Mr. Alioto: Okay. The hearing—it would be a request to—it would be a request to the Court of Appeals to stop the hearing, which, in effect, amounts to a mini-trial of the very issue charged by Sea-Land in its counterclaim denied by both of the plaintiffs.

The Court: Mr. Alioto—

Mr. Alioto: If this goes forward on the 8th.

The Court: Let me tell you something.

Mr. Alioto: Yes.

The Court: You want to do that?

Mr. Alioto: I would like to.

The Court: I think I should give you the privilege of doing it, very frankly.

Mr. Alioto: I wouldn't try to be—I'm not [41] trying to delay anything, Your Honor.

The Court: Oh, no, no, I'm not saying that you're trying to delay anything, but what you're doing is, if the Court of Appeals rules in my favor——

Mr. Alioto: Yes.

The Court: ——you are not strengthening your hand.

Mr. Alioto: Correct, Your Honor.

The Court: All right.

Mr. Alioto: If the Court of Appeals—Your Honor, if the Court of Appeals does not rule in my favor, if they don't take the mandamus, that means they don't want to be bothered by it.

[42] The Court: I don't know what they will say. They may write an opinion in which they say if these facts are established, certain facts are established, this is clearly a case where the Court is warranted in dismissing and should dismiss.

If you are prepared to run the risk of that kind of an opinion out of the Court of Appeals, I'm going to grant you that privilege.

Mr. Alioto: All right, Your Honor. I think I must.

The Court: What I am going to do—

Mr. Alioto: I think I must.

The Court: When do you want to file your Petition for a Writ of Mandamus?

Mr. Alioto: I want to file it on Thursday.

The Court: Very good.

Mr. Alioto: Before I do, Your Honor, I would like to do this. As I see it, I don't want to be filing a Writ of Mandamus that is—that is different than what the Court believes is going on, or does not meet the issues straightaway.

I understand that the motion to dismiss filed by Sea-Land is that we, the plaintiffs, P.F.E.L. and States, have falsely denied, or failed to disclose the language in the pleadings —I'm not sure about, but if I could get [43] it, it's—. . . .

Mr. Alioto: All right. But, now, Your Honor, *I would not* file the mandamus if that were the issue, because if there were confession of perjury or something, if there were anything other than they have framed it in their counterclaim, they have said that we have falsely denied it, they have said that we have—that we have—the language for both is the same. This is their counterclaim, it's the very first paragraph of their counterclaim.

They say that "The acts of States"—and the same language for P.F.E.L.—"The acts of States in failing to disclose or in issuing false denials of the existence [44] of rebates, and other payments alleged in paragraphs 23 and 25 above constitute violations of Section 1 and 2 of the Sherman Act."

In other words, the basis of their claim is that both States and P.F.E.L. failed to disclose, and issued false denials.

Our answer to this was that we deny this charge. And we have demanded a trial by jury for this charge. Now, this is also the basis for the motion to dismiss.

We have denied the basis—

The Court: It's one of the bases for the motion to dismiss.

Mr. Alioto: Even if it were just one, it's the principal one. Even if it were one of twenty, at least that part could not go forward.

The Court: All right, all right. If you gentlemen want to —if you can frame the issue for me, I'll see what you frame.

If you can't, why, I'll frame it myself.

Mr. Alioto: All right. I would like to frame it, because I would not—in a way, I understand I'm imposing on the court, but I would not desire to attempt to take a mandamus against the Court if I—if I didn't—if perhaps I misconceived what the notion or basis was.

But I think it is serious enough that if I am [45] correct, I should proceed this way. And, obviously, I would have to take all the consequences that proceed from it. I don't know what they would be, but I think it is serious enough. . . .

Appendix 2

In the United States District Court
Northern District of California

Before: The Honorable Alfonso J. Zirpoli, Senior Judge

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., R. J. Reynolds Tobacco Company, R. J. Reynolds Leasing Company, Sea-Land Service, Inc., and Mc Lean Industries, Inc., Defendants.	NO. C 76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc., and R. J. Reynolds Tobacco Company, Defendants.	NO. C 77-0582 AJZ

REPORTER'S TRANSCRIPT

Wednesday, December 13, 1978

Reported by: Candace L. Mikkalsen
Wanda J. Harris

[22] 1976 they did not engage in rebating?

Mr. Alioto: The plaintiffs did not. The evidence is that—

The Court: I don't know about the evidence. Is the plaintiff's contention, now, are they saying now and counsel should know enough about his case, now—

Mr. Alioto: Yes.

The Court: Are you saying to this Court, now, that it is your position and, if necessary, that we can establish that prior to October 15, 1976 you did not engage in rebating?

Mr. Alioto: That's correct. PFEL did—

The Court: Pardon?

Mr. Alioto: That's correct. PFEL did not.

The Court: PFEL did not?

Mr. Alioto: An agent did.

The Court: Well, then, if PFEL did not, then what would be wrong with a further inquiry with relation to these three witnesses, as to any conversation that took place relating to rebating of PFEL prior to October 15, 1976?

Mr. Alioto: Pardon me. I don't understand that.

The Court: It's your contention that you didn't.

Mr. Alioto: Correct.

The Court: And what reason would there be for them to discuss rebating prior to October 15, 1976 at the . . .
[68] almost simultaneously. The other witness said within two weeks. The other witness said he couldn't remember how soon after.

[68] Does Your Honor know what happened?

The Court: Well, what happened?

Mr. Alioto: That's what I mean, Your Honor. The fact is that after the meeting, one thing that happened was that rebating by PFEL in 1977 stopped. Almost simultaneously, or two weeks after.

Did Your Honor hear that from counsel? He said there's no—he said there was—

The Court: That's quite plain from the record.

Mr. Alioto: Okay.

The Court: You don't have to tell me that. I knew that.

Mr. Alioto: All right, Your Honor.

The Court: There's some testimony—John I. Alioto testified to that.

Mr. Alioto: Well, as a matter of fact, it was Mr. Hitt, Your Honor, and Mr. Alioto.

The Court: Yes.

Mr. Alioto: All right. Now, what I would like to do, Your Honor, is to first of all—first of all, I think I have to do it. I was not prepared to do it because I thought that counsel, I guess, really was arguing the motion for sanctions on both sides, or at least arguing his side.

Appendix 3

United States District Court
for the Northern District of California

Pacific Far East Line, Inc., Plaintiff, vs. R. J. Reynolds Industries, Inc., et al., Defendants.	NO. C 76-2312 AJZ
States Steamship Company, Plaintiff, vs. Sea-Land Service, Inc. and R. J. Reynolds Tobacco Company, Defendants.	NO. C 77-0582 AJZ

[Filed June 2, 1978]

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING NEW DISCOVERY SCHEDULE

Defendants have moved for an order striking plaintiffs' rebating allegations, either as a sanction under Fed.R. Civ.P. 37(d) for failure to make discovery or as a grant of partial summary judgment under Fed.R.Civ.P. 56 on the ground that such allegations fail to state a claim under the antitrust laws. Plaintiffs have filed a counter motion for

orders directing defendants to produce an unedited copy of the Audit Report and permitting all parties in this action to commence discovery on all issues. With respect to the Audit Report, the court will once again review that document to determine what additional portions thereof, if any, not heretofore disclosed, shall be subject to discovery. With respect to defendants' motions and plaintiffs' request regarding the future course of discovery in this action, the court has considered the briefs submitted and the argument of counsel and rules as follows:

1. Defendants' motion for summary judgment, insofar as it is directed at plaintiffs' rebating claims under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), is granted. That Act does not apply to the rendition of services, and the phrase "goods, wares, or merchandise" contained therein refers solely to tangible items. *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851, 861 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966).

2. Defendants' motion for summary judgment, insofar as it is directed at plaintiffs' rebating claims under the Sherman Act, is denied. Plaintiffs are entitled to attempt to show (1) that such practices constitute an unreasonable restraint of trade in the shipping industry and (2) that, in conjunction with plaintiffs' other allegations, they may constitute a predatory practice in connection with an attempt to monopolize.

3. Defendants' motion for sanctions is denied.

4. The date of March 1, 1978, in paragraph 9 of the court's order dated December 20, 1977, is hereby changed to June 2, 1978.

5. The date of April 30, 1978, in paragraph 10 of the court's order dated December 20, 1977, is hereby changed to July 14, 1978.

Dated: June 2, 1978

Alfonso J. Zirpoli
United States District Judge